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ABSTRACT

The articles collected in this annual address several aspects of First Amendment Law. The following titles are included: "Freedom of Speech As an Academic Discipline" (Franklyn S. Haiman), "Free Speech and Foreign-Policy Decision Making" (Douglas N. Freeman), "The Supreme Court and the First Amendment: 1975-1976" (William A. Linsley), "'Arnett v. Kennedy': Restrictions on Public Employees' Freedom to Criticize" (Angula Gay Tucker), "'Them Dirty, Filthy Books': The Textbook War in West Virginia" (William N. Denman), "Obscenity and Pornography: Legal Arguments and Empirical Evidence" (Roger D. Haney), "Freedom of Speech Bibliography: July 1975-June 1976" (David Eshelman), "The Baskette Collection: A Research Report" (Don Center), and "Rawls's 'A Theory of Justice' and Freedom of Expression" (Roy V. Leeper). (KS)

FREE SPEECH YEARBOOK 1976

A publication of

The Commission on Freedom of Speech

of the

Speech Communication Association

Editor: Gregg Phifer

The Florida State University

Speech Communication Association

5205 Leesburg Pike

Falls Church, Virginia 22041

1977

WE HAVE TO SEE IT FIRST

The statement I write on the board for students who arrive for the first of our Free Speech Colloquium is:

THE FIRST AMENDMENT SHOULD BE ABSOLUTE

Strongly Agree	Agree	?	Disagree	Strongly Disagree

Most atudents "agree," if not strongly. Not far into the course students come to realize that, even when committed to freedom, thinking people may differ in application of the concept.

It also is unnerving to the naive to learn that the struggle for free speech and press has been traumatic. The cup of hemlock, the several hundred thousand women killed for witchery, the masses of people who spent their lives in slavery, the gas-chambers! The picture of our "civilized" past is not pretty. Nor is the present. A man who tried to find the truth behind political stone-walling wrote:

> One of the ugliest aspects of modern life is the fact that between one and two million people are at this moment in jail solely because of their political beliefs...locked up in concentration camps, city jails, national prisons...torture, shackling, semi-starvation and carefully calculated breakdown of prisoner morale...very few of these are terrorists, guerrillas, bomb throwers, or even philosophical advocates of violent change.[1]

And David Brinkley, this year, declared that the picture had gotten worse, that several hundred million more this year than last are living under regimes that have taken giant steps away from rather than toward freedom. Only some 19 per cent, according to his state-of-the-world analysis, live under a degree of liberty reasonably close to what we enjoy. Such a perspective is enough to make one hypersensitive to any local, state, or national policy or practice that looks at all like book burning or suppression of ideas.

Absolute commitment to the First Amendment, paradoxically, has its roots in the crack that scientific thinking made in belief in absolute truth. The Ann Hutchinsons and Mary Dyers and Martin Luther Kings inspire us to make speech and all its fringe benefits available to all by dramatic demonstration. But the struggle, fortunately, is not often fought in the streets. In our complex society, it is waged by coalitions of concerned, informed leaders of organizations, by grass-roots, state, and national associations of people who transform dollars into legal briefs and educational campaigns. Quiet efforts to enact the sunshine laws, as well as more open support for the notorious trials of our Deep Throats, will test our absolute commitment. May the energy and efforts invested in the publication of this yearbook in a very real way contribute to both a more informed national debate of complex free speech issues and to a more intense commitment so necessary to seeing that the First Amendment is held first!

William I. Gorden, Chairman
Commission on Freedom of Speech
Speech Communication Association

[1] Robert Shelton, "The Geography of Disgrace," Saturday Review World, June 15, 1974.

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The H.A. Wichelns Memorial Award for the most significant contribution to the Free Speech Yearbook, established in 1974 to honor H.A. Wichelns, a pioneer in the speech communication discipline and an early advocate of the importance of the speech-law aspect of speech communication:

1976 Award Recipient: William A. Linsley, University of Houston

FREEDOM OF SPEECH AS AN ACADEMIC DISCIPLINE

Franklyn S. Haiman
Northwestern University

Just a little over fifteen years ago a group of about a dozen refugees from the labors of a long day at a Speech Association of America convention gathered at a St. Louis coffeehouse to commiserate with one another about the state of our profession. It was an all-male group, I'm sorry to say.

Our topic of primary concern was that practically nobody in the field of speech was paying any attention, in their research or their teaching, to what seemed to us to be one of the basic premises on which the existence of our discipline depended--the maintenance of a system of freedom of expression. To be sure, most of us gathered around that table were card-carrying members of the American Civil Liberties Union. We knew the names of a few important First Amendment giants like Alexander Meiklejohn, Zechariah Chaffee, and Roger Baldwin, and a few significant First Amendment cases such as Schenck, Terminiello, and Dennis. We knew that James M. O'Neill, a founding father of the modern field of speech, had been for many years one of a tiny handful of prominent Roman Catholics who saw fit, in those monolithic days of that church, to identify himself with the ACLU, working actively on a national committee of that organization. We knew about Jacobus Ten Broek, a non-speech-trained lawyer who then headed the off-beat department of speech at the University of California at Berkeley and had taught a course in freedom of speech at the school for some time. We knew, also, of the work in this area of Robert M. O'Neil, then a recent Harvard Law School graduate and Tufts debate coach, now vice-president of Indiana University, who devised an experimental free speech summer-course offering for the San Francisco State College Speech Department. Stimulated in part by Bob O'Neil's initiative, I had begun plans for a similar course offering on a regular basis at Northwestern, which was approved by the Graduate School Curriculum Committee over the objections of an English professor and a biologist but with the support of the Political Science Department's professor of constitutional law and of faculty members in the School of Law.

Out of that St. Louis coffeehouse meeting came a resolve to get something going by way of erecting a structure within the Speech Association of America to encourage and support teaching and research in freedom of speech. Petitions were drawn up for the creation of an official interest group within the association. That action had some interesting consequences. Several members of the association's leadership group thought that some kind of un-American activity was getting under way. Over considerable opposition of that sort initial approval was won. It did not help matters any when one of the panelists on the first convention program we sponsored chose to exercise his free speech by describing his perceptions of how one of our major Ph.D.-producing university speech departments (identified by the name of the institution and of the speaker's major professor) had rejected his work allegedly because of disagreement with his liberal political views. I recall vividly the cloak-and-dagger drama that played itself out in the hallways and rooms of the Hotel Cleveland that day as Alvin Goldberg, who had chaired this momentous program for us, fought to retain possession of the tape that had been made of the speech in question while other interested parties sought to commandeer it.

Well, that all seems like ancient history now. We finally received official status, not as an interest group but as an all-association Committee on Freedom of Speech. The motivation that led some of the organization's officers to favor this kind of structure--so that a closer eye could be kept on us by the Establishment--was masked by the valid argument that freedom of speech concerns cut across all of the association's interest groups and thus required this horizontal (rather than vertical) mode of organization. When the suspicions about us gradually faded away, we were left with a status that actually enhanced our ability to function visibly and effectively in professional affairs. With a sympathetic association Executive Secretary, a growing respect for the excitement and quality of the convention programming we scheduled, the staying

power of our newsletter, and the usefulness of our yearbook, it was not long before our position in the association was secure and valued. We authored a revised "Credo" for the national association and prepared testimony for submission at congressional-committee hearings. But, what was most important, we played a critical role of leadership in the widespread development over the next dozen years of course offerings, research efforts, and regional activities in freedom of speech. Just last year the Free Speech section of the Western Speech Association launched a newsletter of its own. Today we inaugurate a new division within the Southern Speech Association.

So much for the politics of the study of freedom of speech as a communication-oriented discipline. I take it that our primary business here today is to talk substance; to discuss the kinds of contributions that have been made, can be made, and should be made by our field to a better understanding of the problems of freedom of expression in contemporary society.

As with almost every problem area that has been addressed by scholars in speech communication one is confronted at the outset with some jurisdictional questions. What do we have to offer, for which we are qualified, that is unique and that differs from what lawyers, political scientists, or sociologists and philosophers of the law may do? The answer to those questions, I'm afraid, is no more definitive than it is to the jurisdictional questions we have confronted with respect to persuasion and social movement research, interpersonal communication, small group behavior, and almost everything else we have done. Hopefully we approach all these areas with a perspective that is informed by an understanding of symbolic transactions that persons not trained in our field simply do not have. Hopefully, also, no one of us will venture far into any of these areas without the necessary preparation that related disciplines provide. I'm not sure whether a would-be scholar of freedom of speech is much worse off without sufficient legal background than is a would-be scholar of interpersonal communication with insufficient knowledge of psychology, but it does seem that such weaknesses are more readily apparent and more immediately disabling in the freedom of speech area.

Passing on from the jurisdictional questions with those general (and not very helpful) observations, let us turn to an examination of some of the kinds of research which have been done in freedom of speech. In my judgment these are most suggestive of areas in which further work is needed and in which speech communication scholars may be able to play a useful role. I do not plan to deal here with our teaching role, for that would require more time than is available. In any event that role ought to be guided by the sort of research we do.

Historical-Critical Research

Whenever I want to expose a graduate student to my ideal in the way of historical-critical research, no matter what the topical area, I can find no better model than Leonard Levy's Legacy of Suppression: Freedom of Speech and Press in American History.[1] To me this book is historical scholarship at its finest and most influential. Finding and pulling together original source materials that had not been utilized before, Levy, a historian by training, propounded and persuasively demonstrated the thesis that our Founding Fathers had no such absolutist notions about freedom of speech as Justice Hugo Black had always attributed to them, nor did they intend "to wipe out the common law of sedition," as Zechariah Chaffee had so authoritatively maintained.[2] Levy's revisionism was not calculated to undermine contemporary absolutist interpretations of the First Amendment, nor has it had that effect. His purpose was only to set the record straight concerning the roots from which we have grown. That he has done with unchallenged success.

I do not expect every speech communication scholar who turns a hand to historical explorations in freedom of speech to produce a Legacy of Suppression. But there are many more modest contributions that can be made to our understanding of the system of freedom of expression through historical-critical

scholarship. We have had a few such pieces appearing in our journals and in the Free Speech Yearbook from time to time. I am familiar with at least one excellent doctoral dissertation, by Walter Terris, entitled The Right to Speak: Massachusetts, 1628-1685.[3]

Case or Field Studies

Contemporary controversies over freedom of speech are a rich, exciting, and never-ending source of data about the dynamics of intolerance, repression, and resistance. When carefully analyzed, they provide fresh insights that can help shape social policy and judicial doctrine. Prime examples are the studies that were done of the famous Rap Brown speech in Cambridge, Maryland, in the summer of 1967. That speech was followed by rioting and the burning of a school and ultimately led to the passage by Congress of the so-called Rap Brown (or Anti-Riot) Amendment to the Civil Rights Act of 1968, under which the Chicago Seven Conspiracy case was prosecuted. Two studies of that incident provide provocative food for thought about our laws on incitement to riot. One of them, by a pair of speech communication scholars--Patrick Kennicott and Wayne Page--appeared in the Quarterly Journal of Speech in 1971.[4] The other, a more extensive and well-financed study in the field, done by a research team of social scientists for the National Advisory Commission on Civil Disorders, was so hot to handle that it came to public attention only because the 35-page report was stolen from the Commission's files and leaked to the New York Times.[5]

Empirical and Experimental Studies on Communication Effects

In 1970, as you may remember, a national Commission on Obscenity and Pornography, which had been established by Congress and appointed by President Lyndon Johnson, recommended the abolition of all laws prohibiting the distribution of so-called obscene material to consenting adults. That recommendation was based in large part upon an extensive compilation of empirical and experimental research leading to the conclusion that there was "no evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal behavior among youth or adults."[6] The Commission's recommendations were described by then-President Richard Nixon as "morally bankrupt."[7] Three years later his four appointees to the U.S. Supreme Court, joined by Justice Byron "Whizzer" White, followed his lead on the subject. Said Chief Justice Warren Burger, speaking for the five-man majority:

> Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist.... From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation....[8]

Despite this bit of know-nothingness on the part of the Supreme Court majority, those less ideologically bound were significantly influenced by the Commission's findings. I assume that it is only a matter of time until its views prevail. Justice William Brennan, for example, who authored the Supreme Court's opinion that obscenity was not protected by the First Amendment, changed his mind and, along with former Justice Douglas and Justices Marshall and Stewart, now believes that all prohibitions on obscenity directed to consenting adults violate the First Amendment.[9]

Another area in which empirical and experimental studies are beginning to have a significant influence upon our thinking about freedom of speech is that of the impact of movie and television violence upon social behavior. As I assume you are aware, some evidence is accumulating that a steady diet of filmed violence may induce higher levels of aggressive behavior on the part of viewers.[10] A few tentative steps have been taken by the Federal

Communications Commission[11] and some city councils[12] to address the problem. Certainly specialists in communication should be making some contribution to the debates that I assume lie ahead of us on this question. Without more data, I, for one, do not know for sure which side of that debate I am likely to be on, even in the face of evidence of some relationship between that communication and anti-social behavior. The complex of variables that account for anti-social conduct is far too intricate a web for me to be content with remedies directed to just one of the strands.

Attitude Research

The attitudes that some members of the public bring to free speech questions and the personality structures associated with those attitudes may not be relevant to the development of theories about how things ought to be in a system of freedom of expression, but they certainly are critical in determining what it is politically feasible to accomplish. For that reason survey research on attitudes toward freedom of speech issues can be immensely useful. Alton Barbour, of the University of Denver Speech Communication Department and former editor of the Free Speech Yearbook, did his doctoral dissertation in this area and has continued to take an active interest in it. I gained what I felt to be considerable enlightenment through a four-month survey research project I conducted in Denmark a few years ago on attitudes toward a variety of free speech questions.[13] William Gorden, of the Speech Department of Kent State University, has done a considerable amount of work with the free speech attitudes of students.

I might note in this connection that the Report of the Commission on Obscenity and Pornography frankly admitted that its recommendation for continuation of controls on obscene material directed to children was based not on its own best judgment, but on public-opinion polls that seemed to indicate that this is what most parents in the United States desire.

Critical Analyses and Theory Development

I have saved for the last what I regard as the most difficult and most important scholarship in which we can engage with respect to freedom of speech. I refer to critical analyses and evaluations of prevailing free speech doctrines and theories with a view to their refinement and improvement. This task, as I see it, involves two steps: (1) to discover and describe the way that our courts, as well as the public for whom they act as surrogates, perceive, define, evaluate and control, legally or extra-legally, the various kinds of communication transactions that occur in our society; and (2) to examine the accuracy of those perceptions, the adequacy of those controls. To put the matter another way, the task is to test the evidence and reasoning upon which the conventional wisdom of public and courts is based, using whatever skills we may possess because of our presumed expertise in understanding the communication process.

The reason I place so high a priority for us on this activity is that so little has been done along these lines by anyone other than lawyers and law professors; and although some of their work has been brilliant, too many of them suffer from the narrow vision that legal training and experience tend to cultivate. The occasional brilliant examples that lawyers have produced can provide us with models and inspiration. I am thinking of such works as Jerome Barron's famous Harvard Law Review article on "Access to the Press--A New First Amendment Right,"[14] Martin Redish's "The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression,"[15] and the Columbia Law Review's piece on "Symbolic Conduct."[16] At the more ambitious level of general theory there is, of course, Thomas Emerson's exposition of his "full protection theory" in The System of Freedom of Expression.[17]

I can tell you from the personal experience of trying my own hand at this kind of research and writing, in a Northwestern University Law Review article entitled "Speech v. Privacy: Is There a Right Not to be Spoken To?",18 that the challenge is great, the work is hard, but the rewards are immensely satisfying. When I picked up the U.S. Supreme Court's decision handed down last June, in the case of a drive-in movie in Jacksonville, Florida, which had been prosecuted for thrusting unwanted communication upon passersby who could see the screen from outside the fence, and discovered without any forewarning that the Court, in overturning that conviction, had prominently cited and apparently relied upon the thesis put forth in my article,19 I knew that it had been worth the effort and that students of communication can have influence on First Amendment law.

There are many free speech issues that are now ripe for critical analysis and the development of more adequate theory. In closing let me list a few of them on which speech communication scholars ought to have something helpful to say:

1. The law of incitement. To what extent, if any, should communicators be held legally responsible for the actions of an audience?
2. The problem of heckling. At what point does permissible heckling become prohibitable disruption? Should distinctions on this question be made between open-air meetings and gatherings that are held inside of rented public facilities?
3. The problem of excluding auditors. Should groups that assemble in rented public meeting rooms have the right to exclude unwanted auditors from their meeting?
4. Residential picketing. Should the environs of private residences be placed outside the bounds of the public forum?
5. Commercial speech. Can a valid rationale be found for the regulation of false or misleading statements about products and services in the absence of such controls on other kinds of speech? What is and what is not commercial speech?
6. The law of libel and of invasion of privacy. Does the possibility of being sued for defamation or invasion of privacy exert an unduly chilling effect upon freedom of speech? Are less inhibiting remedies available?
7. Expression of views by public-school teachers. To what, if any, extent should the free expression of personal political, social, or religious views by public-school teachers and administrators be curbed into contexts where their audience is captive to them?
8. Nonverbal behavior and lawless conduct. How can we distinguish between nonverbal behavior as communication that should be protected by the First Amendment and that which is conduct more properly subject to legislative control?
9. Group libel. Should "group libel" (or incitement to racial and ethnic hatred) be outside the protection of the First Amendment, as it is in many other democratic nations?
10. Anonymous communication. What balance should be struck between a communicator's right to anonymity, in the interest of being able to speak freely without fear of retribution, and the public's right to know the source of a communication in the interest of making a more complete evaluation of its merit?
11. Limitations on campaign practices. Are limitations on campaign contributions and expenditures a necessary and justifiable intrusion into the exercise of free speech rights?
12. Access to mass media. Should some degree of direct public access to the mass media of communication be compelled by law?

If the speech communication discipline, through historical, experimental, descriptive, or critical research, can influence First Amendment law on any of these questions, we shall have amply justified our entry into the field.

FOOTNOTES

Paper prepared for presentation to the Southern Speech Communication Association Convention, San Antonio, Texas, April 9, 1976.

[1]Harvard University Press, 1960.

[2]Free Speech in the United States (Harvard University Press, 1948), p.21.

[3]See, for example, "Baptist Preaching from Virginia Jails, 1768-1778," Southern Speech Journal, Winter, 1964; "John Haynes Holmes and Freedom within the Church," Free Speech Yearbook, 1967; "Repression in Great Britain, 1792-95," Free Speech Yearbook, 1975; and The Right to Speak; Massachusetts, 1628-1685, unpublished dissertation, Northwestern University, 1962.

[4]"H. Rap Brown: The Cambridge Incident," Quarterly Journal of Speech, October, 1971, pp. 325-34.

[5]New York Times, March 6, 1968, and letter to the author from Robert Shellow, adviser to the Director of Public Safety, District of Columbia, May 14, 1968.

[6]Report of the Commission on Obscenity and Pornography (Bantam Books, 1970), p. 32.

[7]New York Times, October 25, 1970, p. 71.

[8]Paris Adult Theatre vs. Slaton, 413 U.S. 49 (1973).

[9]Paris Adult Theatre.

[10]George Comstock, "The Effects of Television on Children and Adolescents--The Evidence So Far," Journal of Communication, Autumn, 1975, pp.25-34.

[11]Report to Congress on the Broadcasting of Violent, Indecent and Obscene Material, Federal Communications Commission, February 19, 1975.

[12]Chicago Sun-Times, February 3, 1973, p. 1.

[13]"Danish Attitudes Toward Freedom of Expression," Sociologiske Meddelelser, A Danish Sociological Journal, 1970, pp. 21-57. Reprinted as a monograph of the Northwestern University Center for Urban Affairs under the title "The Effect of Urbanization upon Danish Attitudes toward Freedom of Expression," 1971.

[14]80 Harvard Law Review 1641 (1967).

[15]39 George Washington Law Review 429 (1971).

[16]60 Columbia Law Review 1091 (1968). Reprinted in Haig Bosmajian, The Rhetoric of Nonverbal Communication (Scott Foresman, 1971), pp. 118-140.

[17]Random House, 1970.

[18]67 Northwestern University Law Review 153 (1972).

[19]Erznoznik v. Jacksonville, 43 U.S. Law Week 4809 (1975).

FREE SPEECH AND FOREIGN-POLICY DECISION MAKING

By Douglas N. Freeman
Auburn University

Freedom of speech, including the right to criticize the opinions, proposals, and policies of people in power, is a fundamental principle of our governmental system. It is a cherished value in our society. In addition, restrictions on free expression deny basic inalienable rights. Freedom of expression has significant instrumental or practical values. The democratic ideal assumes that wisdom is discovered in popular consensus. Thus, free speech is essential to effective decision making.

Free speech is a necessity in governmental agencies and policy making groups. The communication of ideas, information, and opinions during the formulation of policy is an important factor influencing the quality of decisions. The writer of this paper analyzes recent foreign-policy deliberations and argues that the decision-making process has been handicapped by barriers to free speech.

Foreign-policy decisions illustrate the difficulty of insuring free speech in bureaucratic settings. Two major barriers to free expression during policy formulation--acquiescence and token dissent--are then described and illustrated by recent foreign-policy deliberations.

Effective Decision Making

The meetings of established groups of policy makers or *ad hoc* groups of foreign-policy advisers are essentially small-group, problem-solving discussions. Some foreign-policy decisions are largely dictated by ideological values, cognitive beliefs, or decisional premises unquestioned among policy makers. However, in many cases of international conflict, decisional premises of policy makers are not coherent or homogeneous.

> It is particularly in these more ambiguous situations that the process of policy making may itself have considerable causal and instrumental importance if it succeeds in subjecting decisional premises and initial perceptions to critical examination and debate before policy preferences solidify behind one option.[1]

Optimal policy and program discussions depend on an atmosphere and structure that guarantee and encourage debate, critical analysis, and free expression of opinion. If group decision making is to be effective, "all members should be allowed the right of self-expression without hidden threats."[2] "In a successful group no member withholds information because he is frightened, anxious, or disgusted."[3] Government bureaucracies and policy-planning councils tend to reach better decisions if communication is open and free expression protected. "Groups in which free communication is maximized are generally more accurate in their judgments."[4] Laboratory studies of decision-making groups provide some evidence that conflict and free expression of dissent within the group may have a constructive effect on its problem-solving activity and on the quality of its choices.[5] Government officials engaged in formulating United States foreign policy must feel free to intellectually disagree with existing policies as well as those currently being discussed. Moreover, policy makers should be encouraged to express their criticism during policy deliberations.

Thorough analysis and in-depth consideration of all possible alternative or policy options are important to effective foreign-policy decision making. Policies are likely to be sounder after recognition and critical analysis of all points of view. In their analysis of organizational and group problem solving, Blau and Scott suggest that

> the different frames of reference that individuals bring to a group aid in the search for a correct solution among several alternatives.... Different frameworks make it easier for them to detect the mistakes and blind spots in the suggestions of one another.[6]

Alexander L. George, a political scientist of Stanford University, observes that

> disagreement within the decision-making group on the proper objectives, the proper means, the kinds and level of risk present in the situation, is more likely to improve the analytical process and the advice that precedes the final choice of policy the President makes.[7]

J. William Fulbright, former chairman of the Senate Commitee on Foreign Relations, concludes that

> freedom of thought and discussion gives a democracy two concrete advantages over a dictatorship in the making of foreign policy: it diminishes the danger of an irretrievable mistake and it introduces ideas and opportunities that otherwise would not come to light. The correction of errors in a nation's foreign policy is greatly assisted by the timely raising of voices of criticism within the nation.[8]

For the most effective process of foreign-policy decision making the flow of information and advice should be open and uninhibited. One of the most persistent and serious problems in foreign-policy formulation is an atmosphere of consensus, described by Irving Janis as a social psychological phenomenon of group dynamics. He uses the term "groupthink" to refer to "a mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members' strivings for unanimity override their motivation to realistically appraise alternative courses of action."[9] During the administrations of Presidents Kennedy, Johnson, and Nixon, free expression and effective intragovernmental communication were largely absent from foreign-policy deliberations. Government bureaucrats and advisers have rallied behind existing policy, reluctant to oppose programs favored by senior officials. In his book Thirteen Days, Robert Kennedy wrote:

> There is an important element missing when there is unanimity of viewpoint. Yet that not only can happen; it frequently does when the recommendations are being given to the President of the United States. His office creates such respect and awe that it has almost a cowering effect on men. Frequently I saw advisors adapt their opinions to what they believed President Kennedy and later President Johnson wished to hear.[10]

Barriers to Free Expression

Established patterns of communication during foreign-policy decision making inhibit critical analysis of policy, free expression of dissenting opinions, and consideration of alternative policy options.[11] Two primary obstacles to free speech are acquiescence and token dissent.

Acquiescence

Effective foreign policy depends on full and uninhibited discussion of all possible alternatives. A serious decision-making problem arises when subordinates acquiesce or fail to express opinions that might offend their superiors. Both the structure and the atmosphere of the foreign-policy bureaucracy inhibit vertical communication and produce pressure toward conformity. "The Foreign Service philosophy--the result of officers serving with one another during two or three decades--tended to mute dissent and tone down an expression of opinion to a higher authority."[12] During his years as chairman of the Senate Foreign Relations Committee, Senator Fulbright noted the pressure toward conformity or acquiescence present in the foreign-policy organization:

> The State Department...has many intelligent, courageous and independent-minded Foreign Service Officers, but...there are also sycophants and conformists.... That, I suppose, is the worst of it: the censorship of ideas after a while no longer needs to be imposed; it is internalized, and the individual who may have begun his career as an idealist, full of hopes and ideas, becomes his own censor, purging himself of "unsound" ideas before he thinks them, converting himself from dreamer to drone by the time he reaches that stage in his career at which he can expect to be entrusted with some responsibility.[13]

When important foreign-policy problems are being considered, the President is usually personally involved. If the President's policy preference is known beforehand or becomes apparent early in the deliberations, advisers tend to rally behind the President's choice. Theodore Sorensen has written:

> A President must carefully weigh his own words. Should he hint too early in the proceedings at the direction of his own thought, the weight of his authority, the loyalty of his advisers and their desire to be on the "winning side" may shut off productive debate. Indeed, his very presence may inhibit candid discussion. There will always be subordinates who are willing to tell a President only what they want him to hear, or, what is worse, only what they think he wants to hear.[14]

Acquiescence is not necessarily due to personal weakness and is not limited to lower-ranking advisers. "Even the Assistant to the President may have both motive and opportunity to hold back information, the more so if he has himself risen through the ranks."[15] Theodore Sorensen, a former presidential adviser, has observed: "Even the most distinguished and forthright advisor is usually reluctant to stand alone. If he fears his persistence in a meeting will earn him the disapprobation of his colleagues, or a rebuff by the President...he may seek the safety of greater numbers."[16]

The problem of acquiescence is greatest during important foreign-policy discussions when the President is present.[17] However, subordinates often acquiesce before men of only slightly higher rank. The tendency to acquiesce is evident at all levels of the foreign-policy structure.[18]

One basic cause of acquiescence is the desire to protect one's prestige, status, and rank within the organization. "Occupants of a position are very protective of their authority and prestige--they do not want to lose it."[19]

Subordinates are reluctant to criticize programs favored by their supervisors. If bureaucrats are critical of established programs, they may lose favor with their superiors. The desire to "stay on the team" generates considerable pressure to acquiesce. "The inclination to remain silent

or to acquiesce in the presence of great men--to live to fight another day, to give in on this issue so that you can be 'effective' on later issues--is overwhelming."[20]

Acquiescence was an important factor in the Bay of Pigs affair. Arthur Schlesinger describes the decision making deliberations in this way: "Our meetings were taking place in a curious atmosphere of assumed consensus. The CIA representatives dominated the discussion. The Joint Chiefs seemed to be going along."[21] Concerning the Bay of Pigs discussions Robert Kennedy wrote: "We had virtual unanimity at the time of the Bay of Pigs. At least, if any officials in the highest ranks of government were opposed, they did not speak out."[22]

However, doubts did exist. Chester Bowles, then Undersecretary of State, disagreed with the invasion plans. Dean Rusk "went to the SEATO conference in late March and Chester Bowles as Acting Secretary sat in his place, Bowles was horrified by what he heard but reluctant to speak out in his chief's absence."[23] Rusk himself had doubts but at the White House meetings "Rusk said little except to offer gentle warnings about avoiding excesses."[24]

Arthur Schlesinger also had grave doubts about the Bay of Pigs plans. He gave the President two memoranda opposing the policy but he failed to press his view and took the easy way out:

> In the months after the Bay of Pigs I bitterly reproached myself for having kept so silent during those crucial discussions in the Cabinet Room, though my feelings of guilt were tempered by the knowledge that a course of objection would have accomplished little save to gain me a name as a nuisance. I can only explain my failure to do more than raise a few timid questions by reporting that one's impulse to blow the whistle on this nonsense was simply undone by the circumstances of the discussion. It is one thing for a Special Assistant to talk frankly in private to a President at his request and another for a college professor, fresh to the government, to interpose his unassisted judgment in open meeting against that of such figures as the Secretaries of State and Defense and the Joint Chiefs of Staff.[25]

Schlesinger concluded that "had one senior advisor opposed the adventure, ... Kennedy would have canceled it."[26]

President Lyndon B. Johnson's Vietnam policy was also sustained by bureaucratic acquiescence. When he asked his advisers to list all possible policy options available in Vietnam, they unanimously suggested the policy favored by the President. James C. Thomson, East Asian specialist in the Department of State and in the White House between 1961 and 1966, writes:

> In the summer of 1964 the President instructed his chief advisors to prepare for him as wide a range of Vietnam options as possible for postelection consideration and discussion. He explicitly asked that all options be laid out. What happened next was, in effect, Lyndon Johnson's slow-motion Bay of Pigs. For the advisors so effectively converged on one single option--juxtaposed against two other, phony options (in effect, blowing up the world or scuttle and run)--that the President was confronted with unanimity for bombing the north from all his trusted counselors.[27]

There was some disagreement within the executive branch when President Johnson decided to bomb North Vietnam, but Undersecretary of State George Ball, the principal dissenter,

> supported the decision to bomb, though he had grave misgivings about it.... But Ball...was afraid of losing all credibility; he felt that as the "devil's advocate" he was still playing a useful role, but one that depended on his staying in his job and retaining the President's trust in him and his loyalty.[28]

Another adviser with doubts about the bombing of North Vietnam was John McNaughton, a former law professor at Harvard University. David Halberstram writes that:

> There was no more skillful player of the bureaucratic game than John McNaughton, for he understood the bureaucracy very quickly and how to play at it, and he learned this, that his power existed only as long as he had Robert McNamara's complete confidence, as long as everyone in government believed that when he spoke, he spoke not for John McNaughton but for Bob McNamara. That, with its blind loyalty and totality of self-abnegation, meant bureaucratic power, and John McNaughton wanted power. Any doubts he had were reserved for McNamara, virtually alone, and perhaps one or two other people that he knew and trusted, who would not betray him with gossip, so that the word would not go around Washington that McNaughton was a secret dove.... McNaughton would go back and pour out his doubts to one man, Robert S. McNamara, a man who he was still in awe of. McNamara would override them, he would dampen them, it would be business as usual, and McNaughton, the secret dove, would emerge from the Secretary's office and hide his doubts, because he still wanted to be a player, and he knew there was no power at the Pentagon if he differed from McNamara at all.[29]

During the Nixon administration, Richard Helms, head of the Central Intelligence Agency, also fell victim to the effectiveness trap during the India-Pakistan war. When Nixon and Henry Kissinger told him to tilt, he complied. "Not once did he dispute Kissinger's distorted version of the facts, even when Helms' own agency had produced refutation."[30] Acquiescence is thus a major barrier to free speech and effective decision making.

Token Dissent

Another obstacle to effective foreign-policy decision making is token dissent. When policy makers provide nonsubstantive criticism, they create the illusion of meaningful analysis of policies. Such token dissent is a disservice because it actually helps prevent conscientious criticism of major foreign policies.

Token dissent meets one of two fates: (1) Dissent is institutionalized. That is, dissenters are allowed to express criticism, giving the appearance of open discussion, but policy makers never fully consider dissenting opinions. (2) Forceful dissenters are excluded from decision-making deliberations. Token dissent thus provides an illusion of free speech and critical analysis without seriously challenging existing policies. John P. Leacocos concludes that jargon about "keeping the options open" may have "more a liturgical than intellectual significance."[31]

Token dissent characterized deliberations on the Bay of Pigs invasion plan. Although several individuals expressed dissenting opinions, their criticism was institutionalized. Schlesinger, for example, "was taken aside and told to 'lay off.' Those who opposed the invasion were 'heard' but given no encouragement to develop the case against it or to form themselves into a group that would look into the issues more thoroughly."[32]

When Senator Fulbright became concerned about newspaper forecasts of a Cuban invasion, he wrote a memorandum to President Kennedy, opposing American intervention. Fulbright's dissent won him a seat in the final decision-making conference,[33] where his doubts were heard but not seriously considered. Schlesinger writes:

> Fulbright, speaking in an emphatic and incredulous way, denounced the whole idea. The operation, he said, was wildly out of proportion to the threat. It would compromise our moral position in the world and make it impossible for us to protest treaty violations by the Communists. He gave a brave, old-fashioned American speech, honorable, sensible and strong; and he left everyone in the room, except me and perhaps the President, wholly unmoved.[34]

Following Fulbright's speech, the President did not open the floor to discussion. Instead, he continued the straw vote around the table. Irving Janis describes how Fulbright's dissent was "managed" or "institutionalized:"

> Wittingly or unwittingly, the President conducted the meeting in such a way that not only was there no time to discuss the potential dangers to United States foreign relations raised by Senator Fulbright, but there was also no time to call upon Schlesinger, the one man present who the President knew strongly shared Senator Fulbright's misgivings.... The President's demand that each person, in turn, state his overall judgment, especially after having just heard an outsider oppose the group consensus, must have put the members on their mettle. These are exactly the conditions that most strongly foster docile conformity to a group's norms.[35]

Chester Bowles, Undersecretary of State, also wrote a memorandum against the Bay of Pigs operation. But his dissent was stifled by Secretary of State Dean Rusk, who "reassured Bowles, leaving him with the impression that the project was being whittled down into a guerilla infiltration..."[36]

Thus, the CIA plan to invade Cuba was opposed by a few individual advisers, but criticism was institutionalized to merely token dissent. Alexander George concludes that "all accounts of Kennedy's management of the policy-making process in this case make clear that far from seeking opportunities to encourage vigorous multiple advocacy, he was reluctant to see it develop and hoped to satisfy his own doubts about the plan by procedures which did not so directly challenge its advocates and supporters."[37]

Token dissent was common during the Vietnam War. In fact, high officials welcomed dissent regarding our Vietnam policy to appease public opinion, newspapermen, and intellectuals.

> As the Vietnam controversy escalated at home, there developed a preoccupation with Vietnam public relations as opposed to Vietnam policy-making. And here, ironically, internal doubters and dissenters were heavily employed. For such men, by virtue of their own doubts, were often deemed best able to "massage" the doubting intelligentsia.[38]

George Ball, Undersecretary of State, was the primary "devil's advocate" on Vietnam. Daniel Ellsberg suggests that referring to Ball as a devil's advocate reduced the effectiveness of his dissent. Ellsberg observes:

> Surely the term 'devil's advocate' itself was a protective euphemism for Ball.... it would have been too dangerous and unacceptable to admit that he believed what he was actually saying. This is not a nice commentary on the language necessary within our bureaucracy.[39]

Ball's criticism of U.S. policy in Vietnam is a classic case of token dissent. "Once Mr. Ball began to expreas doubts, he was warmly institutionalized: he was encouraged to become the in-house devil's advocate on Vietnam."[40] He was "heard" but not "listened to."[41] Chester Cooper concludes: "George Ball waa frequently brought to a meeting to put on his dog-and-monkey act of being a devil'a advocate; but ... once having listened to the devil's advocate, you felt that you had done your duty. He got his hearing and you proceeded."[42]

If decision-making groups and policy-making organizations cannot institutionalize dissent and enforce group norms through subtle pressures of social control, the decision makers will reduce their interaction with the dissenter and isolate the deviant.[43] If the dissenter still fails to conform, he may be excluded from the decision-making process, especially if his standing is already low.[44] Paul Hare, a sociologist, writes: "Small groups as well as large groups will reject deviant members if the group can survive more effectively without them than with them."[45]

Because anything stronger than token dissent is not appreciated by the foreign-policy organization, serious dissenters run the risk of being excluded from the group. Richard J. Barnet, co-director of the Institute for Policy Studies in Washington, suggests that "the man who questions ... makes himself a candidate for reassignment."[46] Henry Villard, a former State Department officer, echoes Barnet's sentiments.[47] Robert Kennedy wrote about "efforts ... to exclude certain individuals from participating in a meeting with the President because they held a different point of view."[48]

When Vice-President Hubert Humphrey forcefully argued against the decision to bomb North Vietnam, his views were received at the White House "with particular coldness, and he was banished from the inner councils for some months thereafter, until he decided to 'get back on the team.'"[49]

Similarly, Clark Clifford, Secretary of Defense, was denied access to information regarding the Paris peace talks because he disagreed with President Johnson's Vietnam policy. Chester Cooper, a former member of the National Security Council, writes: "When ... the President in the late summer of 1968 waa displeased with Clark Clifford's views on bombing, he restricted him and all other officials of the Department of Defense from receiving telegrams relating to the Paris talks."[50]

The most sweeping suppression of free speech occurred in 1964, when the Vietnam affair became a delicate subject. President Johnson systematically eliminated those State Department officials who questioned the wisdom of escalation in Vietnam. Some advisers who were transferred, demoted, or pressured to resign were Averal Harriman, Paul Kattenberg, Roger Hilsman, Bill Truehart, and Michael Forrestal.[51] These and other

> doubters had become marked men; they would not be major players again on Vietnam because they had antagonized Lyndon Johnson with their opposition .... In the aftermath State's doubters were so depleted that State easily acquiesced in the 1965 escalation.[52]

Excluding from group deliberations individuals holding different ideas and interpretations reduces policy alternatives, retards critical review, and weakens foreign policy. A less obvious but equally harmful influence on foreign policy is exerted by the simple possibility of exclusion from the decision-making process. Critical analysis is prevented because

the mere threat of group sanctions or exclusion inhibits freedom of expression.

> Participation is a goal in itself, and exclusion a bitter punishment... The acquisition of status and prestige becomes an end in itself rather than a derivative of some significant achievement. The validation of one's efforts is a nod from the bureau chief or the privilege of attending the next meeting with the Secretary.[53]

A review of recent foreign-policy discussions reveals that much of the debate and critical analysis are cosmetic rather than substantive. Clearly, token dissent is a major barrier to free speech and effective foreign-policy decision-making.

CONCLUSION

Freedom of speech is a valuable American freedom. Perhaps equally important, however, freedom of expression is instrumental to achieving optimally effective decision making. Recent foreign-policy deliberations have been dominated by pressures toward conformity, inhibiting free speech. The major barriers to free expression during foreign-policy decision making -- acquiescence and token dissent--are not limited to particular policy problems and are not the result of weak or inadequate advisers; rather, the atmosphere and structure of the conferences on foreign-policy produce patterns of communication which restrict free expression of alternative points of view. Prestige, status, rank, and desire to be effective all intensify pressures to acquiesce. Token dissent may be welcomed because it gives the appearance but not the substance of meaningful analysis and open discussion. Forceful dissenters who cannot be institutionalized are frequently excluded from decision-making deliberations. U. S. foreign-policy decision making would be improved by encouraging dissent, critical analysis, and freedom of expression.

FOOTNOTES

[1]Alexander L. George, "The Case for Multiple Advocacy in Making Foreign Policy," The American Political Science Review, 46 (September, 1972), 768.

[2]Gerald M. Phillips, Communication and the Small Group, The Bobbs-Merrill Series in Speech Communication, ed. by Russel R. Windes (Indianapolis: Bobbs-Merrill, 1966), p. 67.

[3]Clovis R. Shepard, Small Groups: Some Sociological Perspectives, (San Francisco: Chandler, 1964), p. 124.

[4]A. Paul Hare, Handbook of Small Group Research, (New York: Free Press of Glencoe, 1962), p. 389.

[5]See, for example, N.R.F. Maier, Problem-Solving and Creativity in Individuals and Groups, (Belmont, Calif.: Brooks-Coles, 1970). See also, R.L. Hoffman, "Conditions for Creative Problem Solving," Journal of Psychology, 52 (Oct., 1961), 429-444; Victor H. Vroom, Lester D. Grant, and Timothy S. Cotton, "The Consequences of Social Interaction in Group Problem Solving," Organizational Behavior and Human Performance, 4 (February, 1969), 77-95.

[6]Peter M. Blau and W. Richard Scott, Formal Organizations: A Comparative Approach, (San Francisco: Chandler, 1962), pp. 119, 243.

[7]George, "Multiple Advocacy," p. 770.

[8]J. William Fulbright, The Arrogance of Power, (New York: Vintage, 1966), p. 31.

[9]Irving L. Janis, Victims of Groupthink: A Psychological Study of Foreign Policy Decisions and Fiascoes, (Boston: Houghton Mifflin, 1972), p. 9.

[10]Robert F. Kennedy, Thirteen Days: A Memoir of the Cuban Missle Crisis, (New York: W. W. Norton, 1968), p. 112.

[11]A major problem in analyzing foreign policy decision making is the absence of objective, first-hand sources. Researchers must rely on the historical accounts of participants (such as Sorensen, Decision-Making in the White House; Arthur Schlesinger, A Thousand Days; Chester Cooper, The Lost Crusade; and Robert Kennedy, Thirteen Days). These may be slightly self-serving or even strongly biased. Or one may rely on the second-hand reports of scholars (such as Harold Wilensky, Organizational Intelligence; and James C. Thomson, in Pfeffer's No More Vietnams?) or newspapermen (such as Jack Anderson and David Halberstam).

[12]Andrew Berding, Foreign Affairs and You! How American Foreign Policy Is Made and What It Means to You, (Garden City, New York: Doubleday, n.d.), p. 32.

[13]Fulbright, Arrogance of Power, p. 29.

[14]Theodore C. Sorensen, Decision-Making in the White House: The Olive Branch or the Arrows, (New York: Columbia University Press, 1963), pp. 36-37, 60.

[15]Harold L. Wilensky, Organizational Intelligence: Knowledge and Policy in Government and Industry, (New York: Basic Books, 1967), p.45.

[16]Sorensen, Decision-Making in the White House, p. 62.

[17]Sorensen, p. 60.

[18]James C. Thomson, in No More Vietnams? The War and the Future of American Foreign Policy, ed. by Richard M. Pfeffer (New York: Harper and Row, 1968), p.47

[19]David K. Berlo, The Process of Communication, (New York: Holt, Rinehart, and Winston, 1960), p. 155.

[20]Thomson, No More Vietnams?, p. 46.

[21]Arthur M. Schlesinger, Jr., A Thousand Days: John F. Kennedy in the White House, (Boston: Houghton Mifflin, 1965), p. 250.

[22]Kennedy, Thirteen Days, p. 112.

[23]Schlesinger, A Thousand Days, p. 250.

[24]Janis, Victims of Groupthink, p. 39.

[25]Schlesinger, A Thousand Days, p. 255.

[26]Schlesinger, p. 259.

[27]Thomson, No More Vietnams?, pp. 49-50.

[28]Henry Brandon, Anatomy of Error: The Inside Story of the Asian War on the Potomac, 1954-1969, (Boston: Gambit, 1969), p. 501.

[29]David Halberstam, The Best and The Brightest, (Greenwich, Conn.: Fawcett, 1969), pp. 445, 448.

[30]Jack Anderson and George Clifford, The Anderson Papers, (New York: Ballantine, 1973), p. 287.

[31]"Kissinger's Apparat," Foreign Policy, 5 (Winter 1971-72), 23.

[32]George, "Multiple Advocacy," p. 779.

[33]The circumstances surrounding Fulbright's involvement in the Bay of Pigs discussions are unusual. As Fulbright writes in The Arrogance of Power (pp. 47-48), President Kennedy allowed him to hitch a ride to Florida on his plane during Congress' Easter recess in 1961. During the flight Fulbright heard presidential advisers discussing a plan for the invasion of Cuba. Fulbright gave Kennedy a short memorandum advising against the project. This he had already prepared because newspaper forecasts and rumors of an invasion were widespread. Fulbright subsequently aired his views by request at a meeting of senior White House advisers.

[34]Schlesinger, A Thousand Days, p. 252.

[35]Janis, Victims of Groupthink, p. 44.

[36]Schlesinger, A Thousand Days, pp. 250-251.

[37]"Multiple Advocacy," p. 779.

[38]Thomson, No More Vietnams?, p. 46.

[39]No More Vietnams?, p. 110.

[40]Thomson, No More Vietnams?, p. 45.

[41]George, "Multiple Advocacy," p. 773.

[42]Chester Cooper, No More Vietnams?, p. 110.

[43]George C. Homans, The Human Group, (New York: Harcourt, Brace, 1950), p. 287.

[44]Homans, pp. 287-388.

[45]Handbook of Small Group Research, p. 45.

[46]Richard J. Barnett, No More Vietnams?, p. 69.

[47]Affairs at State (Binghamton; New York: Thomas Y. Crowell, 1965), p. 98.

[48]Thirteen Days, p. 117.

[49]Townsend Hoopes, The Limits of Intervention, (New York: David McKay, 1969), p. 31, See also, Brandon, Anatomy of Error, pp. 50-51.

[50]Chester L. Cooper, The Lost Crusade: America in Vietnam, (Greenwich, Conn.: Fawcett, 1970), p. 495.

[51]In David Halberstam's bestseller, The Best and The Brightest, pp. 449-461, he describes the process by which these dissenters in the State Department were removed from Vietnam policy-making deliberations.

[52]Halberstam, The Best and The Brightest, pp. 460-461.

[53]Barnet, No More Vietnams?, p. 68.

THE SUPREME COURT AND THE FIRST AMENDMENT: 1975-1976

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I. Harmony Yes, First Amendment No

The 1975 Supreme Court term began with the retirement of Justice Douglas and ended with the ailing Justice Thurgood Marshall's hospitalization with heart trouble. Both events do not bode well for restoration of the respect extended in the past to the First Amendment by more liberal justices. Justice William J. Brennan, Jr., who dissented in 45 of 135 signed opinions on all issues, may soon be the lone spokesman consistently supportive of free expression. Obviously unhappy with his frequent minority role, Brennan, in a rare public speech, recently condemned his colleagues for acting "increasingly to bar the federal courthouse door to the litigants most in need of judicial protection of their rights." Brennan finds himself out of step with the continuing drift of the Court to the right. In general the government and the police, not the individual, are receiving the Court's support. This caused Brennan to join with Marshall this term in nearly a third of the cases in which two justices dissented. When Brennan and Marshall found a third to join them in dissent, most often this was Justice Byron White.

Despite Brennan's dissents, which equaled those cast by Douglas the previous term, the Court found greater harmony within its ranks. Seventy per cent of the cases were decided with two or fewer justices dissenting. Since Warren Burger became Chief Justice in 1969, this is the highest percentage of agreement. Five-to-four votes decreased from 16 to 13 as compared to a year ago, Brennan cast only two lone dissents as compared with Douglas's 11 years ago, and conservative Justice William H. Rehnquist reduced from six to three his lone dissents. For the first time since the four Nixon appointees (Burger, Blackmun, Powell, Rehnquist) have been on the Court, they were not in the minority on any 5-4 vote. Each time they voted together on such splits, they achieved a majority by attracting Justices White, Stevens, or Stewart.

Except for a surprisingly firm unanimous decision to overturn a Nebraska decision restricting pretrial publicity of a sensational mass murder the First Amendment continues to be squeezed. More and more forums where people can express themselves are being withdrawn. The impact of each individual case on the First Amendment may be questionable, but the emerging pattern reveals that only the most flagrant abuse of First Amendment rights will arouse recognition by a majority of the justices. In matters affecting freedom of expression the Court's record for the 1975-76 term can be described most charitably as "mixed."

In Hynes v. Borough of Oradell * the Court overturned an ordinance requiring notice to police as a prerequisite for door-to-door solicitation and canvassing. Seemingly this was supportive of the First Amendment, but Chief Justice Burger reversed the ordinance for vagueness and seemed to regret that he lacked the power to supply the ordinance with the precise content that would have saved it. It remained for Brennan and Marshall to point out

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*Case citations for the 1975-76 Supreme Court term do not appear in this article because they are not assigned until a time subsequent to the preparation of this material.

that even precisely drafted ordinances can still be unconstitutional. Rehnquist found neither vagueness nor a threat to the First Amendment.

Even with a unanimous Court behind the judgment for a free press in Nebraska Press Association et al. v. Stuart, Burger left the door ajar to gag the press "when the restraint is justified." Five of his colleagues on the bench were forced through concurring opinions to state a stronger case against restrictions on the press.

More solid evidence that public forums are being foreclosed and individual rights withheld is apparent in several First Amendment cases the Court agreed to hear during the 1975-76 term. The Court upheld:

1. An Army post regulation banning political activity and literature distribution (Greer v. Spock et al.);

2. The liability of a publisher for the nonmalicious reporting of erroneous results of a public proceeding (Time Inc. v. Firestone);

3. An ordinance containing content-based restrictions controlling the physical location of motion-picture theatres (Young v. American Mini Theatres);

4. The principle that open shopping centers may not be equated with city streets and sidewalks for purposes of deciding whether peaceful labor pickets and others can demonstrate there (Hudgens v. N.L.R.B.).

To the credit of the Supreme Court this term it pioneered a new application of First Amendment protection: commercial speech. When the Court struck down a Virginia law that bars advertising of prescription drug prices, it demonstrated a genuine interest in protecting consumers from anti-competitive practices long assured by the barriers erected by thirty states against prescription drug advertising.

Curiously in recent years pornography has received more protection than advertising. The separation of commercial speech from other expression types dates back to 1942, when the Court upheld New York City's ban on handbills advertising the exhibition of a locally moored submarine. By failing to restrain governmental proscriptions of "purely commerical advertising," the Court has supported those who regard advertising as an intrusion on public sensibilities and a threat to high-level professional conduct. For yet another reason the Court apparently has excluded commercial speech from First Amendment protection to avoid further confusion over what speech is protected speech. No longer is advertising excluded from protection, but the uncertainty of the dimensions of protection are already apparent and are certain to produce confusion.

The Court decision was silent about the right of doctors and lawyers to freely advertise and thus failed to go as far as it might have. Nevertheless, the Court has provided the public with the opportunity to receive more information about prices and possibly services than ever before. Hopefully the Court will not hedge its initial recognition that open information about the marketplace is the best protection of consumer interests.

Two developments during the past term are noteworthy for their future impact on First Amendment cases. Justice Rehnquist appears to be moving toward a position of greater influence on the Court; and Justice Stevens, the newest member, demonstrated that he is more considerate of First Amendment rights after only six months on the bench than Rehnquist has demonstrated in five years.

Contrary to predictiona about how he would perform, some of the most significant majority opinions are being delivered by Justice Rehnquist.

Although his earlier decisions placed him at the Court's extreme right, he seems to be moving more toward the center and consequently a position of greater influence. Instead of merely sounding off on his own views he seems increasingly concerned with getting wider support for a legal principle. Rather than a maverick of the past, he is regarded, even by those who differ with him, as more of a "team player" who disagrees amiably and carries his share of the case load. This growing influence may serve to attract wavering colleagues to support his hesitant and at times disdainful regard for First Amendment rights--a regard that has not changed in his movement on other issues toward the center of the Court.

The vigor with which Justice John Paul Stevens, the newest Court member, challenged Nebraska's prosecutors and opposed restraints on the press gives rise to optimism about his future stand on First Amendment issues. Last December, when the justices indicated that they were split 4-4 over the constitutionality of the Nebraska gag order, Stevens appeared ready to break the tie in favor of a free press at the risk of a trial prejudiced by the press. Stevens wondered aloud about the obstruction to justice a gag order in the Watergate case would have allowed. Any such optimism about Stevens's future performance must, however, be tempered by the observation of Court watchers who describe as arrogant his statements made when declining to support a review of an appealed obscenity conviction. President Gerald Ford's appointment of Stevens appeared to complete a shift to the right begun with the Nixon appointments. But Stevens, who votes for law enforcement and against discrimination, shows no commitment to any particular element on the Court and has yet to establish a First Amendment voting pattern.

II. Opinions Rendered

Municipal Corporations

Hynes v. Borough of Oradell (44 LW 4643)

The issue in this case is whether a municipal ordinance violates freedom of speech and due process by requiring advance notice to be given to the local police department by "any person desiring to canvass, solicit or call from house to house for a recognized charitable ... or political campaign or cause ... in writing, for identification only."

The appellants, a state assemblyman who wished to campaign for re-election and three voters who wished to canvass door to door and speak with candidates, brought suit in the Superior Court of Bergen County, New Jersey, claiming that the ordinance unconstitutionally restricted their activity.

The Superior Court held the ordinance invalid because it was unenforceable for lack of a penalty clause, unrelated to its announced purpose of crime prevention, and unclear "as to what is, and what isn't required" of those who wished to canvass for political causes. The Appellate Division affirmed the trial court's decision, but both were reversed by the Supreme Court of New Jersey, which held that free speech interests were not infringed because the ordinance imposed minimal requirements that

> may be satisfied in writing, suggesting that resort may be had to the mails. It need be fulfilled only once for each campaign. There is no fee. The applicant does not have to obtain or carry a card or license. And perhaps most importantly no discretion reposes in any municipal official to deny the privilege of calling door to door. The ordinance is plainly an identification device in its most basic form.

In an opinion delivered by Chief Justice Burger, with Justice Rehnquist dissenting, the United States Supreme Court reversed the Supreme Court of New Jersey and held the ordinance invalid because of vagueness.

Burger contended that the ordinance explains neither what the law covers nor what it requires. There is no clue as to what is a "recognized charity" or a "political cause." There are no specific instructions as to what must be set forth in the required notice, what the police will consider sufficient identification, and what standards will be used by those who apply the ordinance. Burger declared his Court to be without power to remedy these defects by supplying the ordinance with precise and constitutional content.

Justices Brennan and Marshall concurred in part with the Burger majority opinion but went further and rejected the implication that, aside from vagueness defects, this kind of ordinance would ordinarily withstand constitutional attack. They contended that threats to First Amendment rights remain despite precisely drafted ordinances.

Justice Rehnquist, in his dissent, found no unconstitutional vagueness and no other grounds for withholding support for the ordinance. He concluded: "No constitutional value is served by permitting persons who have avoided any possibility of attempting to ascertain how they may comply with a law to claim that their studied ignorance demonstrates the law is impermissibly vague."

Young v. American Mini Theatres (44 LW 4999)

At issue in this case is whether the First and Fourteenth Amendments prevent the city of Detroit from using prior restraints and criminal sanctions to enforce content-based restrictions on the geographic location of motion-picture theatres that exhibit nonobscene but sexually oriented films.

City ordinances prohibit location of adult theatres within 1,000 feet of any two other "regulated uses" or within 500 feet of a residential area. "Regulated uses" applies to 10 different kinds of establishments such as adult bookstores, cabarets, bars, hotels, pool halls, and shoeshine parlors. An "adult" establishment exists if it presents "material distinguished or characterized by an emphasis on matter depicting ... specified sexual activities or specified anatomical areas."

The respondents - American Mini Theatres - contend that the ordinances are so vague that they violate the due-process clause of the Fourteenth Amendment, that they are invalid under the First Amendment as prior restraints on protected communication, and that the classification of theatres on the basis of content violates the equal-protection clause of the Fourteenth Amendment.

The District Court upheld the ordinances, but the Court of Appeals reversed, holding the ordinances to be a prior restraint on constitutionally protected communication and in violation of equal protection.

In a 5-4 decision delivered by Justice Stevens and joined in by Burger, White, Powell, and Rehnquist the Supreme Court reversed the Appellate Court and upheld the ordinances. Stevens found neither violation of due process because of vagueness nor significant effect on the exhibition of films protected by the First Amendment. State courts could remove doubts about the amount of sexual activity necessary before that film is "characterized by an emphasis" on such matter. Stevens declared this case as inappropriate to allow the challenge that invalidity existed "not because of their own rights of free expression ... but because of the assumption that the ordinances' very existence may cause others not before the Court to refrain from constitutionally protected speech or expression."

The court majority also found no prior restraint on protected expression because of the licensing or zoning requirements. All films, they pointed out, may be exhibited commercially only in licensed theatres. Such regulation does not violate free expression, because the city's interest in planning and regulating property use for commercial purposes is sufficient to support restrictions on location. Further, "the city's interest in the present and future character

of its neighborhoods adequately supports the limitation imposed by the ordinances on the place where adult films may be exhibited." This finding acknowledged that the content of pictures may be the basis for zoning restrictions without violating First Amendment protections.

Two dissenting opinions were filed. Justice Stewart claimed that the Court rode roughshod over the First Amendment requirements that time-place-and-manner regulations affecting protected expression be content-neutral. According to Stewart the fact that offensive speech does not address "ideas of social and political significance" does not render such speech unworthy of constitutional protection. Justices Brennan, Marshall, and Blackmun joined Stewart in calling the decision an aberration that ignores the fact that "in those instances where protected speech grates most unpleasantly against the sensibilities judicial vigilance must be at its height."

Justice Blackmun dissented on the grounds that the ordinance is unconstitutionally vague and gives no guidance. He was bothered because a theatre operator would find it too difficult to determine if he is in violation of the ordinance. For instance, "at any moment he could become a violator of the ordinance because some neighbor has slipped into a 'regulated use' classification." Blackmun concluded that, irrespective of agreements for zoning and against distasteful films, suppression without a finding of obscenity under the Court's carefully delineated standards should not be tolerated.

Military

Greer et al. v. Benjamin Spock et al. (44 LW 4380)

Fort Dix, New Jersey, is a federal military reservation assigned the responsibility to train newly inducted Army personnel. Although civilian access is permitted to certain unrestricted areas, post regulations ban speeches and demonstrations of a partisan political nature and also prohibit the distribution of literature without prior approval of post headquarters. Pursuant to these regulations, complainant candidates for President and Vice President were refused, upon request, permission to distribute campaign literature and hold a political meeting on the post. The other complainants, previously evicted for distributing unapproved literature, were denied re-entry to the post. The complainants brought suit to prevent enforcement of the post regulations under alleged violations of First [illegible] Fifth Amendment rights. Both trial and appellate courts enjoined the interference by military authorities with political expression in public areas at Fort Dix. In a 6-2 decision the Supreme Court reversed the lower courts in support of the restrictive post regulations.

Justice Stewart, who was joined by Burger, White, Blackmun, Powell, and Rehnquist, set forth the arguments for the court majority. Stewart contended that the basic function of Fort Dix is to train soldiers, not to provide a public forum. A commanding officer, according to Stewart, "has the historically unquestioned power to exclude civilians from the area of his command, any notion that federal military installations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is false." There was no claim that military authorities based on preferred political views discriminated among candidates; in fact, they followed a policy of remaining free from entanglement in partisan political campaigns.

Stewart also rejected the claims of the noncandidate respondents who had previously distributed literature without approval. A military commander, Stewart held, "may disapprove only those publications that he perceives clearly endanger the loyalty, discipline, or morale of troops on the base under his command, and, while this regulation might in the future be applied irrationally, invidiously, or arbitrarily, none of the respondents even submitted any material for review."

Justices Brennan and Marshall dissented by rejecting all but one distinction between this case and Flower v. United States, 407 U.S. 197 (1972) when the Supreme Court held that a peaceful leafleteer could not be excluded from the main street of a military installation to which the public had virtually unrestricted access. After considerable effort to demonstrate that Fort Dix is no less open than Fort Sam Houston was in the Flower case the dissent concluded "there is no longer room, under any circumstance, for the unapproved exercise of public expression on a military base."

Since Flower was not overruled, Brennan and Marshall found only one significant distinction: The communicator in the Flower case was "an innocuous leafleteer and here the parties include one of this country's most vociferous opponents of the exercise of military power." Hardly a distinction, said the dissent, upon which to withhold First Amendment rights.

The Press

Time, Inc. v. Mary Alice Firestone (44 LW 4262)

The question presented in this case was whether the First Amendment's free-expression guarantee protects a publisher from liability under state defamation laws for erroneously reporting the results of a public judicial proceeding.

After Mary Alice Firestone had sought separate maintenance, her husband counterclaimed for divorce on grounds of extreme cruelty and adultery. Finding neither party "domesticated" as defined by the Florida Supreme Court, the marriage was dissolved. Based on routine sources of information, Time magazine published a report that the divorce was granted not on the absence of domestication but "on grounds of extreme cruelty and adultery." Time, Inc., refused to retract its report. Mrs. Firestone's libel action resulted in a jury verdict for damages against Time, Inc.

Time, Inc., denied liability for publishing any falsehood unless the publication was made "with actual malice" as defined in New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Time claimed that Mrs. Firestone is a "public figure" within the meaning previously used when the Sullivan case was applied to defamation suits. Further, Time contended that the item "constituted a report of a judicial proceeding, a class of subject matter which petitioner claims deserves the protection of the 'actual malice' standard even if the story is proven to be defamatorily false or inaccurate."

In a 5-3 decision delivered by Justice Rehnquist the Supreme Court rejected Time's arguments and held that the Sullivan case standard, which bars media liability for defamation of a public figure unless there is proof of knowledgeable falsity or reckless disregard of the truth, was inapplicable to the Firestone case. Mrs. Firestone was found not to be a public figure, because she had not assumed a role of "especial prominence in the affairs of society" and had not been "thrust to the forefront of particular public controversies in order to influence the resolution of the issues involved." Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

Rehnquist further found no reason why a litigant should forfeit protection afforded against defamation simply by being drawn into the courtroom. As the divorce court did not find Mrs. Firestone guilty of adultery as reported by Time magazine; and although Time, Inc., contended that it reported the precise meaning of the divorce judgment, the lower courts properly found the claim of accurate reporting to be invalid. Nevertheless, because liability for defamation cannot be established without a finding of fault and the question of fault was not submitted to a jury or otherwise determined, the Court ordered the judgment for Mrs. Firestone vacated and the case remanded for action not inconsistent with these findings.

Justice Brennan dissented, claiming that within First Amendment protection should be "a margin for error sufficient to ensure the avoidance of crippling press self-censorship in the field of reporting public judicial affairs."

Justice Marshall dissented because he considered Mrs. Firestone to be a "public figure" within the meaning of Gertz v. Welch, 418 U.S. 323 (1974) and Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), and thus exempt from claiming defamation without a display of "actual malice" by Time, Inc. Mrs. Firestone, Marshall pointed out, was involved in a seventeen-month trial that attracted national attention and resulted in at least forty-three articles in the Miami Herald and forty-five articles in two Palm Beach newspapers. In addition Mrs. Firestone, rather than shun the public-figure image, held several press conferences during the legal proceedings.

Nebraska Press Association et al. v. Stuart (44 LW 5149)

A Nebraska State District Judge entered an order restraining the Nebraska Press Association et al. from publishing or broadcasting accounts of confessions or admissions made by the accused or facts "strongly implicative" of the accused in a widely reported murder of six people. The judge found "because of the nature of the crimes charged in the complaint that there is a clear and present danger that pre-trial publicity could impinge upon the defendant's right to a fair trial." The gag order, effective only until a jury was impaneled, prohibited reporting the existence or contents of a confession the accused had made to law-enforcement officers, which had been introduced previously in open court; the fact or nature of statements made by the accused to other persons; the contents of a note written by the accused the night of the crime; portions of medical testimony; the identity of the victims and nature of the assault; and the nature of the restrictive order.

Justice Burger delivered the opinion for a unanimous Supreme Court, reversing the Nebraska Courts. Burger cited extensive case precedents that collectively demonstrated that even adverse pretrail publicity does not inevitably result in an unfair trial. Still other cases were used to show that "prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights." In particular, Burger noted, "the damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events." The Court acknowledged justification for the trial judge's conclusion that there would be intense pretrail publicity and that this publicity might interfere with a fair trial, but the impact of such publicity was of necessity a speculative dealing with unknown factors. Burger called it a "heavy burden to demonstrate in advance of trial that without prior restraint a fair trial will be denied "but concluded that, regardless of difficulty, there must be a showing of the kind of "threat to fair trial rights that would possess the requisite degree of certainty to justify restraint." Burger reaffirmed the presumptions against prior restraint and held that to the extent that the Nebraska District Court restrained publication of reporting or commentary on public judicial proceedings it is "clearly invalid."

Because Burger stressed that "the guarantees of freedom of expression are not an absolute prohibition under all circumstances" it could be speculated that under exceptional circumstances gag orders might be permissible. However, Justices Stevens and White, in separate concurring opinions, expressed doubt that exceptions could be made. An opinion written by Brennan and joined in by Marshall and Stewart insisted that gag orders should never apply to the press during judicial proceedings. Brennan concluded that "the press may be arrogant, tyrannical, abusive, and sensationalist ... but the decision of what, when, and how to publish is for editors, not judges."

Advertising

Virginia State Board of Pharmacy et al. v. Virginia Citizens Consumer Council, Inc., et al. (44 LW 4686)

Prescription-drug consumers, by suing the Virginia State Board of Pharmacy, challenged the constitutional validity of a Virginia statute that allegedly violated the First Amendment because it declared it unprofessional conduct for a pharmacist to advertise the prices of prescription drugs. The Pharmacy Board's contention that the advertisement of prescription drug prices is "commercial speech" and thus outside First Amendment protection was denied by the District Court, which voided the statute.

The issue is whether speech that does no more than propose a commercial transaction is so removed from any "exposition of ideas" and from "truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government," that it lacks all protection.

The Supreme Court, in an opinion delivered by Justice Blackmun, with Rehnquist dissenting, held that First Amendment protection extends not only to the right to disseminate information but to receive it as well. Since the individual consumer and society in general have strong receiver interests in the free flow of commercial information, the State may not suppress the dissemination of truthful information about a lawful activity out of fear for the effect upon its recipients. The Court rejected the argument that the professional image of the pharmacist will suffer when price advertising reduces his status to that of a mere retailer. The State may set any professional standards it wishes and subsidize and protect pharmacies from other forms of competition; but, Blackmun held, the State "may not do so by keeping the public in ignorance of the lawful terms that competing pharmacists are offering." Blackmun concluded that any legitimate time-place-and-manner restrictions on commercial speech are exceeded by the Virginia statute that designates speech of a particular content and prevents its dissemination completely.

In a concurring opinion Chief Justice Burger sought to minimize the professional character of the pharmacist who deals primarily in prepackaged drugs and renders no more "a true professional service than does a clerk who sells lawbooks." Pleased that the Court did not include physicians and lawyers within the scope of its decision, Burger noted that "the advertisement of professional services carries with it quite different risks than the advertisement of standard products."

Justice Rehnquist's dissent described these consumers' rights as "marginal at best." He was unwilling to extend the First Amendment to commercial speech, which opens the door to the dissemination of not merely price but service information and includes in its scope doctors, lawyers, and all other professions. Rehnquist stressed the distinction between use of the First Amendment to assure enlightened public decision making on political, public, and social issues but doubted that the use extends to the decision whether a particular individual should purchase "one or another kind of shampoo."

Labor

Scott Hudgens v. National Labor Relations Board (44 LW 4281)

Labor-union members who peacefully picketed within a privately owned shopping center were threatened with arrest for criminal trespass if they did not depart. The union filed an unfair-labor-practices charge with the National Labor Relations Board. The Board concluded that the threat violated the National Labor Relations Act, and the appellate court agreed.

Justice Stewart delivered the opinion for the Court with Justices Marshall and Brennan dissenting. Stewart contended that the pickets had no First Amendment right to enter the shopping center for the purpose of advertising their strike against their employer. Stewart vacated the appellate court's judgment and remanded that case so the National Labor Relations Board could consider the case exclusively under the National Labor Relations Act's statutory criteria.

Justice Marshall claimed in his dissent that the Court's refusal to extend the First Amendment to a privately owned shopping center results from "an overly formalistic view of the relationship between the institution of private ownership of property and the First Amendment's guarantee of freedom of speech." Privately owned property is not necessarily privately used property and, according to Marshall, "when a property owner opens his property to public use the force of those [private] values diminishes." Marshall acknowledged the public importance of people communicating with one another about matters that relate to businesses which occupy a shopping center. Employees as parties to a labor dispute, just like consumers with complaints, may find the location of a retail store to be the only reasonable and effective way to communicate with the public. "As far as these groups are concerned," Marshall concluded, "the shopping center owner has assumed the traditional role of the state in its control of historical First Amendment forums."

Obscenity

Chester McKinney v. State of Alabama (44 LW 4330)

Chester McKinney was convicted of selling material that in a prior judicial proceeding had been declared obscene. At the trial that resulted in his conviction McKinney was not permitted to contest the obscenity of the material even though it was the basis of his prosecution and he was not a party to the proceedings when material was determined to be legally obscene.

McKinney contended that he was guiltless unless in the present proceeding the magazine was declared obscene according to contemporary community standards. However, the trial court instructed the jury to ignore any determination of obscenity and to decide whether McKinney had sold material judicially declared as obscene.

In an opinion delivered by Justice Rehnquist a unanimous Supreme Court held that by not allowing McKinney to contest the obscenity charge he was denied his First Amendment rights. Since the parties to the earlier obscenity adjudication were not in privity with McKinney and lacked interests sufficiently identical to his, McKinney's First Amendment rights could only be protected when he asserted them in his own behalf in a proceeding to which he was a party.

Government

U. S. v. Abney (44 LW 2557)

Abney, a World War II veteran, for thirty years engaged the Veterans Administration (VA) in controversy over disability benefits. In June, 1975, again rebuffed by the VA, he assumed an around-the-clock vigil in Lafayette Park across from VA headquarters in Washington, D.C. The vigil necessitated sleeping in the park. Four times he was arrested, convicted, and jailed for violating a U.S. Park Service regulation forbidding anyone to sleep more than four hours in a public park without a permit. Abney appealed, and the Supreme Court reversed his convictions.

The Court held the Park Service regulation unconstitutional because Abney's sleeping "must be taken to be sufficiently expressive in nature to

implicate First Amendment scrutiny." Although the regulation granted the Park Service authority to extend sleeping permission beyond four hours, the standards for granting the extension were too inadequate to prevent arbitrary application.

III. Docketed: Other Cases

Disposed

The Supreme Court took action that resulted in allowing the holding of the lower court to prevail in each case that follows except for one in which the lower court judgment was vacated. The issues reported are pertinent to the First Amendment but are not necessarily inclusive of all issues raised by the appeal.

Domestic Relations

Ruling below: An injunction barred a divorced Roman Catholic husband from representing his former wife as his wife. The lower court held that to comply with the First Amendment the injunction could "not restrain him from contending that she is his wife in the eyes of God, that according to tenets of his religion she is still his wife, or that because of his religious views he does not recognize validity of divorce." Issue: Can an individual's freedom of speech be enjoined because such speech interferes with another's interest in privacy? (Certiorari denied. Dickson v. Dickson, 44 LW 3030)

Radio and TV

Ruling below: The FCC properly denied a complaint from the Polish American Congress that a TV broadcast containing "Polish jokes" presented a controversial issue of public importance. Denial of air time to respond to the broadcast was warranted because the FCC's fairness doctrine and personal-attack rule were not violated. Issue: Does the recitation of "Polish jokes" require, under the fairness doctrine, the presentation of contrary views in the interest of balanced programming? (Certiorari denied. Polish American Congress v. FCC, 44 LW 3282)

Schools

Ruling below: The use of mandatory student service fees to subsidize a university campus newspaper does not violate a student's First Amendment rights even if the newspaper advocates ideas contrary to those held by the student. The use of public funds to support a campus newspaper violates no constitutional right, for a state is not prohibited from supporting a forum where diverse views on controversial subjects may be presented. Issues: May the state, through its agencies, express views and promote positions on controversial issues; and, if so, may it compel its citizens to subsidize expression with which they disagree? Is state subsidization of a forum legal when controversial expression is subject to editorial and subject-matter control by public officials? (Certiorari denied. Arrington v. Taylor, 44 LW 3406)

Civil Rights

Ruling below: A Connecticut law prohibiting the public ridicule of a peraon by means of advertisement does not apply to scurrilous political messages broadcast through a telephone-answering device that is privately activated by the voluntary selection of the caller. As the law does not apply to these circumstances, it may not be declared unconstitutional as a result of a suit brought by a person denied service by the telephone company. (Judgment vacated. National Socialist White People's Party v. Southern New England Telephone Co., 44 LW 3519)

Ruling below: Policemen who, pursuant to instructions, destroyed a demonstrator's poster critical of the President abridged First Amendment rights. Issue: Did the court of appeals err in holding that these policemen "acted unreasonably and not in good faith and that their actions were pursuant to impermissibly invidious discriminatory intent"? (Certiorari denied. Louisville v. Glasson, 44 LW 3208)

Criminal Law

Ruling below: Convictions under the Illinois Flag Act for burning the American flag were affirmed. Issues: May Illinois outlaw peaceful and symbolic communication of ideas and remain consistent with the intent of the First and Fourteenth Amendments? May flag burning be held criminal conduct under a statute enacted to preserve the peace when there is no evidence of any imminent danger to the peace? (Appeal dismissed for lack of a substantial federal question. Justices Brennan, Marshall, and Stevens noted probable jurisdiction. Sutherland v. Illinois, 329 NE2d 820, 44 LW 3448)

Issue: Is a statute overbroad which defines as a misdemeanor cursing or abusing anyone or use of "vulgar, profane, threatening or indecant language" over the telephone? (Certiorari denied. Dillard v. Walker, 44 LW 3209)

Issue: Is a statute unconstitutionally vague or overbroad which had been construed by the state supreme court to include speech and apply to conduct "of a nature to corrupt the public morals or to outrage the sense of public decency, whether committed by words or acts"? (Certiorari denied. Pace v. Squire, 44 LW 3108)

Ruling below: There is no violation of the First Amendment when a statute prohibiting "a lewd, obscene, or indecent sexual propoaal" is applied only to proposals to commit sodomy, indecent exposure, or sexual acts with children. Issue: "Is noncoercive, verbal communication to a willing listener of a desire for private, noncommercial, sexual activity protected by the First Amendment?" (Certiorari denied. Garcia v. D. C., 44 LW 3164)

Ruling below: A federal statute (U.S.C. sect. 701) prohibiting misuse of symbols identified with government agencies did not violate the First Amendment when applied to the defendant, who planned to place simulated IRS seizure warnings upon automobiles to create ill will against the IRS. Issue: Does the federal statute infringe on freedom of speech and expression beyond intent of Congress? (Certiorari denied. Goeltz v. U.S., 44 LW 3002)

Issue: Is an Arkansas statute unconstitutionally vague and overbroad if it prohibits use of "profane, violent, vulgar, abusive or insulting language" that is commonly interpreted to arouse anger or cause breach of the peace? (Certiorari denied. Lucas v. Arkansas, 44 LW 3109)

Ruling below: A conviction under a statute that failed to precisely define "force likely to produce great bodily injury" was upheld against a defendant who solicited another to commit assault by means of "force likely to produce great bodily injury." Issue: Does a statute that fails to put a person on notice about what speech is prohibited violate freedom of speech? (Certiorari denied. Bistany v. California, 44 LW 3210)

Defamation

Issue: If a defendant TV magazine claims that a program note (implying that a newsworthy scheduled guest was a "call girl") was unintentional defamation, can publication with actual malice be found as a matter of law? (Certiorari denied. Triangle Publications Inc. v. Montandon, 44 LW 3124)

Ruling below: An allegedly defamatory newspaper advertisement, critical of the performance of a local judge, was not protected under the New York Times v. Sullivan rule, because the advertisement was designed solely to sell newspapers. New York Times v. Sullivan (376 U.S. 254) did not involve commercial advertising designed to sell a product but paid "editorial advertisement" seeking support for a movement of considerable public interest Issues: Is a newspaper advertisement with admitted public interest to be denied First Amendment protection because it has a commercial purpose of attracting purchasers and subscribers? Is the plaintiff required to establish knowing or reckless falsity as in the Sullivan case? (Certiorari denied. The Village Voice, Inc. v. Rinaldi, 44 LW 3140)

Issues: Is a newspaper publisher protected by the First Amendment from a charge of less than "actual malice" in falsely reporting a judicial decision? Do words, to escape First Amendment protection, have to be a defamatory statement of fact "rather than expression of an idea or hyperbole"? (Certiorari denied. E. W. Scripps Co. v. Thomas H. Maloney and Sons, Inc., 44 LW 3073)

The Press

Ruling below: Recovery was allowed a political candidate who claimed malice when a newspaper schemed to discredit him. Issues: Without violating the First Amendment can a newspaper be found guilty of intentionally misleading readers to believe in a political candidate's improper conduct even though stories printed correctly quoted the candidate's opponent? (Certiorari denied. Clay Communications, Inc. v. Sprouse, 211 SE2d 674, 43 LW 3042)

Obscenity

Issues: Must a search warrant that enables allegedly obscene materials to be seized assert the informer's reliability on which the warrant is predicated? For seizures that involve a threat to freedom of expression is there a higher standard of probable cause? Is a search warrant issued for seizure of film being exhibited in a commercial theater invalid if the judge issuing the warrant does not first view the film? (Certiorari denied. Kutter v. U.S., 44 LW 3166)

Issue: Was the defendant's right to due process violated when the jury was instructed that the community standard to be applied in determining obscenity of materials was not 1973, the trial date, but 1969, when the prosecution commenced? (Certiorari denied. Brown v. New York, 44 LW 3321)

Ruling below: Defendants were convicted under the pre-1973 obscenity tests (Memoirs, 383 U.S. 413) when the Court held that there was no basis for believing that they would have fared better under 1973 tests (Miller v. California, 413 U.S. 15). Issues: Is a review of the obscenity findings mandated by the new tests? Was it reversible error for the government to fail to present expert testimony as to the existence of obscenity? (Rehearing denied Ratner v. U.S., 502 F2d 1300, 44 LW 3024)

Issues: Must a jury declare a film obscene before copies can be seized even though there is a judicial determination of probable obscenity prior to each seizure? Did four separate seizures of "Deep Throat" and the arrest of theater employees constitute bad faith and harassment even though each seizure and arrest was made under a warrant issued after a hearing? (Appeal dismissed. Butler v. Dexter, 44 LW 3334)

Ruling below: Refusal by the trial court to limit definition of "community" to a single state for obscenity evaluation purposes was upheld. Issue: In view of an Oregon law legalizing publication of explicitly sexual material for adults is a district court sitting in Oregon bound to consider Oregon as the "community"? (Certiorari denied. Danley v. U.S. 44 LW 3333)

Ruling below: The trial court refused to enjoin an adult theater's display of allegedly lewd and obscene films and dismissed a municipality's complaint to declare it a nuisance. Issue: Did the lower court deny due process and equal protection to the community by not providing a "prompt judicial forum in which to contest" exhibition of the films? (Certiorari denied. Camil v. California Superior Court, 44 LW 3202)

Issue: Does a California statute prohibiting distribution of obscene materials but exempting motion picture operators and projectionists from the law providing they act in the normal course of their duties and have no financial interest in the premises deny equal protection to bookstore clerks and other similar persons? (Appeal dismissed. Pendleton v. California, 44 LW 3283)

Issue: Should the lower court have granted a motion for a new trial based on new evidence that San Diego community standards from which the jury was drawn were "more tolerant of depiction and representation of sex and nudity than those of the nation as a whole" -- standards that were applied at the trial? (Certiorari denied. Hamling v. U. S., 44 LW 3418)

Ruling below: The denial under the Alabama Red Light Abatement Act to permit adult theaters to show films for one year is unconstitutional as prior restraint. The public-nuisance doctrine cannot be used to circumvent First Amendment guarantees. Issue: Can the padlock provisions of the Abatement Act be applied constitutionally to a theater that exhibits obacene motion pictures? (Certiorari denied. Sweeton v. General Corp., 320 So2d 688, 44 LW 3504)

Issue: Does it violate the First Amendment to impose a condition on probation which requires a defendant convicted of promoting obscene material "to refrain from engagingin production, presentation, promotion, sale, or any other involvement with sexually explicit material"? (Certiorari denied. Brown v. New York, 44 LW 3321)

Issues: Do constitutional policies against ex post facto criminal punishment prevent courts from reconstruing a state penal code so as to satisfy the specificity requirements of the Miller case (413 U.S. 15)? Is the exhibition of motion pictures to paying, consenting adults absolutely protected by the First, Fourth, and Fourteenth Amendments? (Certiorari denied. Sandquist v. California, 44 LW 3029)

Issues: Do a search warrant and supporting affidavits describing materials to be seized as "obscene" fail to be sufficiently specific to avoid violation of the First, Fourth, and Fourteenth Amendments? Are constitutional rights violated by massive seizure of 103,000 books and movies without a prior hearing? (Certiorari denied. Mishkin v. New York, 44 LW 3537)

Ruling below: A federal court refused to abstain in a case involving a state statute that had never been construed by the state courts. The state courts held that an Indiana nuisance statute failed to describe sexual conduct prohibited in violation of the Miller case (413 U.S. 15), had not been construed by the state courts to have this specificity, and procedures under the nuisance statute constituted prior restraint on free expression.

Issue: Was the federal court's construction of the state statute so strained and unrealistic so as to make it unconstitutional? (Judgment vacated. Sendak v. Nihiser, 44 LW 3022)

Ruling below: Denied defendant's claim that although the Alabama Supreme Court had incorporated new obscenity standards (Miller v. California, 413 U.S. 15) into state obscenity statutes, these statutes remain vague and misleading. Issue: Do the statutes as now construed remain so vague that they allow convictions based upon nonobscene material? (Certiorari denied. Matheny v. Alabama, 44 LW 3283)

Issue: "Does the seizure of virtually all books and records of [an] entity involved in exhibition of presumptively protected expression constitute unconstitutional prior restraint and unreasonable search?" (Certiorari denied. Hodas v. U.S., 44 LW 3496)

Although the foregoing cases do not constitute all the obscenity questions raised for Supreme Court review, they are nevertheless representative of the major questions the Court declined to answer in this troublesome area of the law.*

Pending

In each of the cases reported below the case has either been argued before the Supreme Court and no written opinion has yet been rendered or the Court has yet to hear the case or otherwise dispose of it. As the final disposition of some cases had not been reported at the time this review was prepared, the status of some pending cases between preparation time and now may have changed.

Municipal Corporations

Ruling below: A municipal ordinance banning "canvassing, soliciting, polling, and distribution of printed matter from door to door without prior registration with police chief and receipt of permit" was upheld. The Court found no exercise of official discretion and held the police power constitutionally valid except for the requirement to disclose dates and routes of solicitation. Issue: Does the ordinance constitute prior restraint in violation of the First Amendment when it applies not only to those selling goods but also to the conduct of surveys for research purposes and opinion polls? (Pending. Ringgold v. Borough of Collingswood, 44 LW 3042)

Ruling below: Convictions for knowingly transporting obscene motion pictures in interatate commerce were affirmed. The appellate court did not err in basing its findings upon the trial record rather than a review of the films. Issue: Does Jacobellis v. Ohio (378 U.S. 184) obligate the court to review allegedly obscene materials? (Pending. American Theatre Corp. v. U.S., 44 LW 3477)

Obscenity

Ruling below: The state was denied an injunction to forbid a movie-theater operator to show allegedly obscene films under the theory of common-law public nuisance. A building used only as a movie theater is not subject to a law forbidding use of buildings for purposes of illegal sexual conduct. The appellate court affirmed a state-court order quashing obscenity complaints on grounds that the state's pertinent statutes violated the First Amendment as interpreted in Miller v. California, 413 U.S. 15 (1973). Issues: Must the Miller obscenity tests be incorporated into state statutes aimed at the regulation of hard-core pornography? May the sale and display of pornography be prohibited under common-law public-nuisance proceedings? (Pending. Pennsylvania v. MacDonald, 347 A2d 290, 44 LW 3586)

Government

Ruling below: The appellate court affirmed a lower-court ruling that dismissed action against a government doctor who allegedly referred to the plaintiff as having "a history of mental illness" and a government lawyer who referred to plaintiff's retirement for "medical reasons." The lower courts granted immunity to the defendants because these statements were within their lines of duty. Issue: Does the doctrine of absolute immunity pertain to these statements? (Pending. Conley v. Eck, 44 LW 3612)

ARNETT V. KENNEDY:
RESTRICTIONS ON PUBLIC EMPLOYEES' FREEDOM TO CRITICIZE

Angula Gay Tucker
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Employee criticism of a superior or an employing agency has never been popular with the superior or the agency. No one knows this better than persons in the military service. There freedom of expression is very limited and freedom to criticize is almost non-existent. Suppression, through the jailing and/or the dishonorable discharge of a military protester, of a First Amendment right is tolerated and even expected by the general public.[1]

Unfortunately, the public is not aware that government employees are working under similar conditions and hence does not realize the significance of a civil servant's inability to disclose questionable conduct within his employer agency. The public has a right to know the purposes for which its money has been used. When a civil servant's freedom to criticize is suppressed through dismissal, suspension, official reprimand, or denial of promotions and benefits, the public has no way of knowing about misconduct within an agency.

Arnett v. Kennedy,[2] the most recent Supreme Court decision involving a public employee's freedom to criticize his employer, received little publicity because most of its litigations occurred during scandal resulting from the Watergate burglary investigation. When the decision was publicly released April 16, 1974, newspapers were full of stories of the subpoena of President Richard M. Nixon's White House tapes, the John Mitchell trial, and the bank robbery involving Patti Hearst.[3] The April 17, 1974, editions of the Washington Post[4] and the New York Times[5] included only a short summary of the decision.

Wayne Kennedy, a nonprobationary federal employee in the Chicago regional office of the Office of Economic Opportunity (OEO), worked with the OEO eight years before his dismissal, although he had advanced from grade GS-7 to GS-12, receiving several commendations for his work. During his employment he had become actively involved in the American Federation of Government Employees, AFL-CIO (AFGE). By the time he was fired he was president of the National Council of OEO Locals, AFGE; first-vice president of the Chicago Council of AFGE Locals; and chief steward of the OEO Employees' Union Local 2816, AFGE.[6]

Between 1969 and 1971 Kennedy intermittently displeased his superiors. In April, 1969, he filed a grievance against a superior, charging him with "deceit, incompetence, and dishonesty."[7] In February, 1971, Kennedy, a field representative at that time, advised community leaders to take control of an OEO-funded organization. This advice his superiors did not appreciate. In June, 1971, he charged the Division Chief of the Lower Great Lakes Operations with "managerial incompetence and with attempting to discredit the employees' union."[8] Kennedy's superiors regarded him as a troublemaker because of his use of available channels within the Civil Service and the OEO to air his grievances against his superiors.

Finally, in December, 1971, Kennedy charged, at a union meeting and to the press, that officials of the OEO Regional Office "negotiated in bad faith" with representatives of Indian organizations about grants of federal funds and accused senior OEO officials of "bribery and conflicts of interest." He specifically cited Regional Director Wendell Verduin and his administrative assistant for attempting to bribe James White Eagle Stewart, a local community leader, with OEO funds if Stewart would sign a statement against Kennedy and another employee.[9]

Verduin did not like Kennedy's remarks and began action to have him dismissed for publicly stating,"without any proof and in reckless disregard of the actual facts known to or reasonably discoverable by him, ... that [Verduin] and his assistant had attempted to bribe [Stewart]."[10] Kennedy protested in writing to Verduin that his statements were constitutionally protected and requested an impartial hearing officer.[11] Verduin refused and fired Kennedy according to provisions of the Lloyd-LaFollette Act, subsection (a), which states that "[a]n individual in the competitive service may be removed or suspended without pay only for such cause as will promote the efficiency of the service."[12] Supplemental regulations of the Civil Service Commission and the OEO were applied also. Both required, in almost identical language, that "employees 'avoid any action ... which might result in, or create the appearance of ... [a]ffecting adversely the confidence of the public in the integrity of (OEO and) the Government' and that employees do not 'engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful or other conduct prejudicial to the Government.'"[13]

Kennedy not only filed an administrative appeal with the Civil Service Commission, but also, on behalf of himself and others similarly situated, initiated class action in the United States District Court for the Northern District of Illinois, declaring that "such cause as would promote the efficiency of the service" was vague and "unwarrantedly interfere[d] with federal career employees' freedom of expression."[14] Kennedy also charged that the procedures established by and under the Lloyd-LaFollette Act for removal of non-probationary employees denied them procedural due process.[15]

The three-judge District Court held that the Lloyd-LaFollette Act and supplemental administrative regulations were "unconstitutionally vague" in failing to "furnish sufficiently precise guidelines as to what kind of speech may be made the basis of removal action" and ordered that Kennedy be reinstated with back pay. They also ordered that the Lloyd-LaFollette Act no longer be enforced nor in any way be "construed to regulate speech of competitive employees."[16]

The OEO appealed to the United States Supreme Court, which reversed the lower court's decision. The Court could not agree on a majority opinion on the due-process issue, but Chief Justice Warren Burger and Justices William H. Rehnquist, Harry A. Blackmun, Lewis F. Powell, Potter Stewart, and Byron R. White did agree that the Lloyd-LaFollette Act and supplementary regulations authorizing removal of an employee for "such causes as will promote efficiency of the service" were not unconstitutionally vague or overbroad, because there are many situations in which public statements by employees might reasonably justify dismissal for cause. This "cause" provision was viewed as adequately describing employee conduct justifying grounds for removal; as authorizing dismissal for speech as well as other behavior; and as excluding constitutionally protected speech.[17]

Two dissenting views were presented by Justice William O. Douglas and by Justices Thurgood Marshall, William Brennan, and Douglas. Justice Douglas thought that Kennedy's remarks about his boss were irrelevant, for his public statements were on a subject in the public domain. In the words of Justice Douglas, Kennedy was "being penalized by the Federal Government for exercising his right to speak out."[18]

Justices Marshall, Brennan, and Douglas saw the Lloyd-LaFollette Act as unconstitutionally overbroad because dismissal for "such cause as will promote ... service" prevents federal employees from exercising their freedom of speech to the fullest extent. The employees can only wonder what remarks will get them fired. The justices also took issue with the majority's opinion that the act was made sufficiently clear and definite by merely holding that it excluded speech protected by the First Amendment and stated that "[t]he Court's answer is no answer at all."[19]

Because of the Warren Court's "liberal" decisions of the 1960's one of Nixon's campaign promises of 1968 was a "strict constructionist" Supreme Court.[20] In his first three years in office he had the opportunity to place four conservative justices on the Court: Chief Justice Burger and Justices Rehnquist, Blackmun, and Powell. During the 1973-74 term, when Arnett v. Kennedy was decided, these four voted together 75 per cent of the time. Justices White and Stewart are considered moderates who could swing the Court either way on a decision; Justices Marshall and Brennan are considered liberals.[21] On the issue of free speech in Arnett v. Kennedy, the conservatives and the moderates formed the majority opinion, and the liberals the dissenting opinions.

As the make-up of the Supreme Court changes, its attitude toward fundamental constitutional rights changes. An example is the Supreme Court's apparent reversion from the doctrine of substantial interest to the doctrine of privilege in Arnett v. Kennedy. The Court's traditional attitude toward public employees is contained in the doctrine of privilege.[22] Under this doctrine, public employment is not considered a constitutional right: therefore, any constitutional right can be restricted while a citizen is publicly employed. If a citizen accepts public employment, he voluntarily accepts the possible forfeiture of his constitutional rights.[23] With the emergence of the doctrine of privilege the government could legally interfere with an employee's constitutional rights.

The doctrine of privilege had its foundation in McAuliffe v. New Bedford, in which public employees' freedom of speech was first restricted. Oliver Wendell Holmes, on the Massachusetts Supreme Court in 1892, upheld the firing of a policeman who had "a constitutional right to talk politics but ... no constitutional right to be a policeman."[24] Though state courts and lower federal courts had used the doctrine since 1892, the Supreme Court did not accept it until 1947 (United Public Workers v. Mitchell).[25]

The doctrine of privilege has been used for removal of public employees for reasons of association and religious and political beliefs; few cases have involved freedom of speech. Adler v. Board of Education (1952) upheld the prohibition of hiring of teachers who "advocated, advised, or taught the overthrow of the governments of the United States ... by force or violence;[26] Public employees' freedom of speech was affected indirectly in Torcaso v. Watkins (1961), in which public officials were required to declare belief in God,[27] and Bailey v. Richardson (1951)[28] and Garner v. Los Angeles (1951), in which government employees were required to take a loyalty oath.[29]

While the doctrine of privilege gained momentum, the doctrine of substantial interest made sporadic appearances.[30] This doctrine agrees with the privilege theory that no one has the right to public employment, yet holds that a public employee may not have his fundamental constitutional rights abridged. A public employee has the same constitutional rights and protections that every other citizen has.[31]

In 1953 the Supreme Court first applied the doctrine of substantial interest in a decision in which public employees were no longer required to take loyalty oaths to get and keep their jobs (Weiman v. Updegraff).[32] The Supreme Court applied this doctrine sparingly until the Warren Court of 1960's. Freedom of association and religion, the right to join unions and

to petition the government, and protection from self-incrimination and unconstitutional searches and seizures received favorable judgments under this doctrine.[33]

The doctrine of substantial interest has generally favored a public employee's freedom of speech and, more specifically, his freedom to criticize. In Baggett v. Bullitt (1964) the Supreme Court held a Washington State requirement of a loyalty oath unconstitutionally vague because its "indefinite language" encouraged public employees to restrict "their conduct to that which is considered safe" and so that "free speech may not be so inhibited."[34] The Court decided in Meehan v. Macy (1968) that it could not approve the "premise ... that an employee of the Government cannot claim the right to both a Government job and freedom of speech."[35] In Pickering v. Board of Education (1968) the Court ruled that teachers have the right to speak out freely on how funds given to schools should be spent and argued that "the threat of dismissal is ... a potent means inhibiting speech."[36] The Speiser v. Randall case (1959) reads, "When one must guess what conduct or utterances may lose him his position, one necessarily will steer far wider of the unlawful zone ...."[37]

Arnett v. Kennedy is a turn from the doctrine of substantial interest of the Warren Court to the doctrine of privilege by the Burger Court. (Justice Douglas, the only member to serve on both courts, has decided against the doctrine of privilege since 1947, when it was first used by the Court.) The Supreme Court assumed all governmental charges against Kennedy to be true. However, the charges were never proved in an adversary hearing and were brought by officials whose conduct was the basis for the Kennedy speech that resulted in the action against him.[38]

The question of abridgement of speech of federal employees in Arnett v. Kennedy hinges on the language of the Lloyd-LaFollette Act ("...such cause as will promote the efficiency of the service"[39]). Ironically the act was brought about by the firing of a Chicago postal employee who told the Chicago press of the unsanitary conditions in some parts of the post office. Part of the act's purpose was apparently to protect a federal employee from dismissal for such criticism of the system and his superiors.[40] It appears that the act was used in the majority opinion of the Court as a weapon against a protection it supposedly provided.

The Lloyd-LaFollette Act also allowed civil-service employees to join unions. (Later additions to the law prohibited strikes.)[41] Another irony is that Kennedy's participation and prominence in the American Federation of Government Employees apparently played a large role in his superiors' displeasure with him and subsequently in his dismissal.

Court decisions on any public employee, whether local, state, or national, affect all other public employees. Arnett v. Kennedy specifically affects more than three million federal public employees and generally affects more than three million state public employees and over more than six million local public employees. This means that over more than twelve million public employees' freedom of expression and right to criticize could possibly be restricted. Adding to these figures men and women in the military services, whose speech has always been stifled, means that approximately 8 per cent of the people of the United States cannot freely express themselves in their jobs.

Even should one hold that restrictions on these Americans' freedom of speech are not important, think of the number of inefficient, incompetent, and dishonest superiors in the civil service and the military service who will continue in their inefficiency, incompetency, and dishonesty and who fire or court-martial subordinates who criticize them or their methods. Criticism of superiors is not popular with superiors. Subordinates know this. If a public employee is not protected from unjust retribution, he will learn to keep his mouth shut to keep his job. The subordinate's logic is clear: If he criticizes the system or the supervisor, he is fired, but he is able to feed his family.

Justice Marshall points out in his dissenting opinion in Arnett v. Kennedy that "the inefficiency of the service" clause prohibits even truthful criticism of a governmental agency if the criticism disrupts an agency's operation, thus punishing protected free speech.[42] If an employee can be fired for telling the truth, how can corrupt and inefficient officials in high agency positions be replaced?

The answer is, they cannot until the Supreme Court gains less conservative members. Until that happens, public employees must say, as did the Doctor in MacBeth, "I think, but dare not speak."

FOOTNOTES

[1] Robert S. Rivken, GI Rights and Army Justice, (New York: Grove Press, Inc., 1970).

[2] 416 U.S. 134, 40 L. Ed. 15.

[3] Washington Post, April 17, 1974.

[4] "High Court Backs Federal Firing of OEO Employee," Washington Post, April 17, 1974, Sect. A, p. 5.

[5] "Court Divided 4 Ways," New York Times, Section A, p. 17

[6] Philip A. Byler, "Fear of Firing: Arnett v. Kennedy and the Protection of the Federal Caesar Employee," Harvard Civil Rights-Civil Liberties Law Review, 10 (Spring, 1975), 474.

[7] Byler.

[8] Byler.

[9] Byler, p. 475.

[10] 416 U.S. 134, 40 L. Ed. 15.

[11] Byler, p. 475.

[12] 416 U.S. 140, 40 L. Ed. 25.

[13] 416 U.S. 142, 40 L. Ed. 26.

[14] 416 U.S. 134, 40 L. Ed. 22.

[15] 416 U.S. 134, 40 L. Ed. 22.

[16] 416 U.S. 139, 40 L. Ed. 25.

[17] 416 U.S. 158-64, 40 L. Ed. 35-39.

[18] 416 U.S. 203-5, 40 L. Ed. 61-63.

[19] 416 U.S. 227-37, 40 L. Ed. 75-78.

[20] William A. Linsley, "The Supreme Court and the First Amendment: 1971-72," Free Speech Yearbook: 1972, (1972), 92.

[21] Justice Douglas was also considered liberal during his tenure on the court. "The Nixon Court: A Further Tilt to Conservatism," U.S. News and World Report, July 15, 1974, pp. 33-34.

[22]Arch Dotson originated the term in his analysis of the legal situation of the public employee. See Arch Dotson, "The Emerging Doctrine of Privilege in Public Employment," Public Administration Review, XV (Winter, 1955), pp. 77-88.

[23]Dotson, pp. 81-2.

[24]Dotson, p. 77.

[25]Dotson, p. 79.

[26]David H. Rosenbloom, Federal Service and the Constitution (Ithaca, N.Y.: Cornell University Press, 1971), p. 177.

[27]Rosenbloom, p. 141.

[28]Rosenbloom, p. 177.

[29]Rosenbloom, p. 176.

[30]Alston v. School Board, 42 F.2d 992 (1940); U.S. v. Lovett, 328 U.S. 303 (1946).

[31]David H. Rosenbloom, "Public Personnel Administration and the Constitution: An Emergent Approach," Public Personnel Administration, XXXV (Jan.-Feb., 1975), p. 52.

[32]Rosenbloom, Federal Service and the Constitution, p. 178.

[33]Rosenbloom, p. 181-82.

[34]Rosenbloom, p. 180-81.

[35]Rosenbloom, p. 184.

[36]Rosenbloom, p. 186-87. An interesting aspect is that the majority opinion used parts of Pickering v. Board of Education and Meehan v. Macy to defend its positions on the free speech issue.

[37]416 U.S. 230, 40 L. Ed. 77.

[38]Byler, p. 475.

[39]416 U.S. 140, 40 L. Ed. 25.

[40]416 U.S. 228, 40 L. Ed. 76.

[41]Rosenbloom, 202-3, 209.

[42]416 U.S. 229, 40 L. Ed. 76.

"THEM DIRTY, FILTHY BOOKS": THE TEXTBOOK WAR IN WEST VIRGINIA

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The hills and hollows of West Virginia are not strangers to controversy, disruption, and violence. The controversy over textbooks which erupted into national prominence in the autumn of 1974 seemed at times to be as typical of West Virginia as coal and poverty. The controversy generated a wide range of attention and comment in the media. The picketing, protest rallies, and violence made good television fare. The print media spent a good deal of time discussing and analyzing the controversy, trying to understand and explain why a lot of school textbooks could cause so much fuss.[1]

It is the purpose of this paper to focus upon the issues and events of the textbook controversy in Kanawha County, West Virginia, that make that controversy of concern to anyone interested in questions of free speech, emphasizing the real and continuing danger to free speech that has existed from the beginning of the controversy.

The textbooks that became the center of the often violent controversy that shattered the Kanawha County schools were chosen under specific procedures established by law and by decree of the West Virginia Board of Education. Two committees, each of five professional educators within the county system, spent several months reviewing language-arts textbooks proposed for adoption for both elementary and secondary levels.[2] When the committees made their recommendations in April, 1974, there was little indication that the chosen texts were objectionable. The elementary texts, selected from a list provided by the State Board of Education, included the "Communicating" series for grades 1 through 6, published by the D.C. Heath Co. The secondary adoptions, screened and recommended solely by the Kanawha County Textbook Selection Committee, included a wide variety of basic works. Three are the "Dynamics of Language" series for grade 7 through 12, published by D.C. Heath Co.; the "America Reads" series and the "Galaxy Program," both published by Scott, Foresman. In addition to the basic series for the secondary level the adopted books included a wide variety of supplemental works, some of which were written by minority-group authors. The large number of supplementary adoptions was necessary in order to meet the requirement, established in 1970 by the West Virginia Board of Education, that text adoptions should show the multiethnic and multicultural diversity of American society.[3]

One member of the Kanawha County Board of Education did raise an objection to the proposed text adoptions when they were presented in April. Mrs. Alice Moore, the wife of a minister, had been elected to the board in 1970 on an anti-sex-education platform. Mrs. Moore commented that she felt that some of the proposed texts were not in good taste, and expressed her concern over the language used in many of the supplemental choices. By the time the Kanawha Board of Education was ready to formally adopt the texts in June, 1974, the books had become the focus of considerable parental objections. As a result of Mrs. Moore's extensive speaking campaign against the texts, the June board meeting saw over more than a thousand in attendance. After heated and lengthy discussion the board deleted eight supplemental texts considered the most objectionable, and adopted the remainder by a vote of 3-2.[4]

The protest against the texts, joined by several ministers from the Kanawha Valley, continued to grow during July and August. When school opened on September 3, a boycott by protesting parents kept nearly 20 per cent of the county's students out of school. During the first two weeks in September the protest included the boycott of schools, along with picketing and blocking access to school-bus barns. These activities were designed specifically to

keep additional students out of school. Protesters picketing coal mines led to a strike by coal miners in Kanawha County and the adjacent counties of Boone and Fayette. The striking miners were then persuaded to engage in wideapread picketing of businesses and industries throughout the Kanawha Valley. At the height of the protest numerous firms, including the Kroger market chain, the Kanawha Rapid Transit System, and several trucking firms, were closed by the pickets.

The spreading school boycott, as well as the increased tensions from the protesters picketing both industries and the school system itself, forced the school board to remove the controversial texts from the schools for a cooling-off period of thirty days. During this period the texts were to be reviewed by a committee of parents, chosen by each board member, who would advise the board on retention or removal of the texts. After some delay the review committee was established and began its task. During the remainder of September and through October the protests continued in the form of mass rallies and picketing of both schools and board-of-education offices. An injunction against mass picketing brought about some arrests, particularly after violence occurred at several schools.

By early November the review committee had made its recommendation. At a televised meeting held in the Charleston Civic Center the Kanawha County Board of Education voted 4-1 to return the controversial texts to the schools. Two series -- the elementary "Communicating" series and the supplementary "Interaction" series for secondary use -- were relegated to school libraries. At the same meeting the board adopted policies that (1) provided that no student would be forced to use books found objectionable by the student's parents, and (2) required parental approval before any student could use any of the new textbooks.[5]

In an attempt to bolster the text protest and to gain additional media exposure for their cause the protesters held what was billed as a "National Textbook Rally" at the end of November. Featuring the Reverend Carl McIntire, the Rally brought some two thousand persons together for the meeting and a march on the state capitol.[6] By the time of the Rally the text protest had drawn the support of a wide variety of groups, mostly right-wing in their political orientation. The John Birch Society, with a bookstore in central West Virginia, was represented with literature at the protest meetings. An organization called the Heritage Foundation, Inc., based in Washington, D.C., provided a lawyer who spent some time with protest leaders in October and November. At one point the International Workers Party briefly entered the action. Robert Dornan, a former television actor from Los Angeles, came to Charleston on several occasions. He represented a group known as Citizens For Decency Through Law. Dornan tried, without success, to organize the protest under his general guidance.[7] The most notorious of the anti-textbook groups to figure in the protest activities during late 1974 was the Ku Klux Klan. After the beginning of the new year the Klan's activities seemed largely aimed at promoting their own organization in the region.[8]

From the very first the anti-textbook protests were marked by acts of violence. With the opening of school in September the incidents included mass picketing that often erupted into fights; shootings both of individuals and of school buses; physical harassment of textbook supporters at board meetings; beatings administered to CBS newsmen covering a protest rally; vandalism on personal automobiles; an open assault on two board-of-education members and the superintendent at a board meeting; and firebombing and dynamiting of school buildings and the central board office building.[9]

In retrospect it may be easy to dismiss much of the violence as a typical pattern of behavior on the part of the Appalachian mountaineer. During the month of September, however, the chaotic situation in Kanawha County prompted one editorial writer to say that "What occurred in Kanawha County last week approached mob rule."[10] There was little doubt in the minds of many West Virginians that the protest over textbooks had created a situation approaching anarchy.

As the controversy developed and gained national attention many commentators began to search for the cause of the protest. Some felt that the controversy had become so bitter because it was class warfare.[11] The protesters, according to this view, were the fundamentalist, white, mostly Anglo-Saxon descendants of early Appalachian settlers, living largely in hollows around the urban center of Charleston, in rebellion against sophisticated Episcopalian "outsiders" who populated the hilltops around and in Charleston. Ben Franklin, veteran West Virginia watcher of the New York Times, commented: "The mountain people resent patronizing jokes, and resist the central authorities whose reforms have failed them."[12]

The idea that the textbook protests grew out of a deeper antagonism directed against the unresponsive and unsympathetic board of education found support from several sources. The Wall Street Journal commented in October, 1974: " ... the deeper motive of the protesters seems to be resentment--against the schools, the bureaucrats, and the upper classes in general. 'Even hillbillies have civil rights,' read one sign. The immediate protest was aroused by what appeared to them as an especially condescending attempt to revise their cultural outlook ..."[13] Carl Marburger, former New Jersey Commissioner of Education, felt that " ... there was an astonishing insensitivity to local cultural values by the public-school system, from the board down to the classroom teachers."[14]

A view of the controversy as a political confrontation was taken by June Kirkhuff Edwards, writing in the Christian Century. For Ms. Edwards the controversy over the texts " ... raises far more fundamental questions of ethics, politics, and educational theory. The protest of these angry parents against the literature books has a legitimate, perhaps even healthy, base. Their concern over 'dirty' words is only a focus for a much deeper concern: who shall control the education of their children?"[15]

While all these aspects of the controversy were undoubtedly contributing factors in the textbook struggle, they do not fully explain the basis for the conflict over the textbooks. Many commentators saw the struggle as one between two competing cultures; a conflict in which one group saw its culture and beliefs being subverted by an evil and corrupt society. Russell Gibbons, writing in Commonweal, called the protest "... a widespread cultural counter-revolution which outrages Eastern sensibilities and attitudes toward education, religion and community values ... West Virginia's textbook controversy ... has blown into a full-scale eruption of frustrations against a worldly culture imposed in an area literally a world apart from the rest of the country."[16]

There is little doubt, from a reading of the sociological literature on the nature of the Appalachian mountaineer, that a sizeable majority of the white, essentially Scotch-Irish residents of the Appalachian mountains have, well into the century, maintained a strong set of values. This value structure, incorporating a firm belief in God, with Jesus Christ as Savior, along with a resolute faith in the Bible as the expressed Word of God, permeates Appalachian culture not only in the rural but in the urban areas as well. This fundamentalist religious faith, coupled with traditional social and political mores, gives the Appalachian a value system that is, in many ways, increasingly out of harmony with the changing value structures of a sizeable portion of the rest of contemporary America.[17]

The heart of the textbook controversy in Kanawha County, West Virginia, was a clash of values. The value system of the protesters was seen by them to be in sharp contrast to what they perceived as the dangerous value system depicted in the newly chosen textbooks. Following state mandate the textbooks were specifically chosen to " ... accurately portray minority and ethnic group contributions to American growth and culture and [to] depict and illustrate the inter-cultural character of our pluralistic society."[18] It was precisely this fact that so enraged the protesters.

The protesting parents, believing in the power of the Word of God as written in the Bible, and believing in evangelism that can help a person to be "born again" with faith in Jesus Christ, found it easy to believe that the new textbooks could be equally effective in destroying that faith. Just as the Bible was found to be a powerful written source of beliefs and values, so, too, the textbooks were seen as powerful sources of beliefs and values. For these protesting parents the newly chosen textbooks took on an awesome power to destroy that which they had sought so long to build and maintain and protect: a value system that was to be handed down, unchanged and unchanging, from generation to generation. The schools were no longer the means of building and maintaining the values that the protesters held to be true, had become the purveyors of a warped and degenerate value system. The new texts said nothing to support the protesters' values. Their contributions to "our pluralistic society" went unnoticed.

Through all the recent changes in morality and behavior in our society, through all the last decades with the Playboy Bunnies, the "Hippies" and the drug cult, through the loosening of legal restraints on pornography and obscenity -- through all these changes so thoroughly analyzed and praised in the national media, these parents had held to the hope that they could keep their children true to the ideals of the families in which they were being raised. Now, at long last, the schools, too, had capitulated. The sense of betrayal--the feeling of outrage at this final blow--permeated the textbook protest. For a parent who believed, as one of the protesting ministers made clear at a meeting, that "We own these children," the thought of losing that child to the sick, degenerate morality of an immoral world struck fear and outrage into the hearts of these parents. The only choice, then, was for the protesters to use any and all means at their command to drive the dangerous textbooks out of the schools.

A reading of the protest literature, as well as an examination of the protesters' detailed objections to the textbooks, clearly shows their concerns: First and foremost, the new texts were alleged to teach "irreligion" and a "disrespect for religion and religious beliefs." Many of the texts, it was asserted, were unpatriotic or tended to portray America, the capitalistic free-enterprise system, and the American government in a bad light. The texts were thought to be "dirty" and to contain language that was offensive either because of its avowedly sexual nature or because it was seen as profane or obscene. The texts, particularly the elementary selections, were felt to teach children how to question parents and resist parental authority. The texts were supposedly racist in that they included selections from minority writers that contained passages showing hatred and contempt for whites.[19] Finally, many of the texts, on both the elementary and secondary levels, attempted to persuade students to examine their own value systems, beliefs, and attitudes, thus bringing into question beliefs that the protesting parents did not want questioned.[20]

From the very beginning of the controversy in the Spring of 1974, and continuing unabated throughout 1974 and into 1975, the message has been the same: There is unalterable opposition to the textbooks. They must be removed from the schools. From the very first the protesters have sought one firm goal: to keep all students in Kanawha County from reading or using the "dirty, filthy books." Their fears, expressed again and again, particularly in letters to newspapers, are that the textbooks will corrupt their children. It has not been enough for the Kanawha County Board of Education to allow some students to use the books and to allow some parents to keep their children from using the books through a parental-approval system. Consistently the protesters have argued that the very presence of the books, whether they are actually being used by their own children or not, will be a corrupting factor within the schools. The books must be totally and completely removed. There has never been any willingness to compromise on this essential point.

The controversy in Kanawha County may appear to be settled. Certainly the books have been returned to the schools. Children are being allowed to use them at the discretion of their parents. Guidelines have been established for future text adoptions and are in use as screening committees evaluate texts in other fields for later adoption. But in reality very little has been settled. The protests of 1974 and early 1975 have created a situation that continues to threaten vital principles of free speech.

The Kanawha County Board of Education's removal of the controversial texts from the schools in September, 1974, for a review by a committee of parents appointed by the individual board members, was the first step in capitulating to the textbook protesters. The review committee, which split into two bodies, one ostensibly pro-text and the other anti-text, recommended the return of the texts with two exceptions: The D.C. Heath elementary series "Communicating" was to be available only in school libraries. The "Interaction" series for the secondary level was also relegated to library-only use. Both series could be available only with strict parental permission. Eventually the board sought to gain state approval for a replacement for the D. C. Heath series. When the texts were returned to the schools, the Board of Education established a procedure whereby parents were required to say in writing that their children could use any of the new language-arts texts on both elementary and secondary levels.

This parental-approval system met with mixed success. In some schools, particularly where the teachers and principals supported the texts, parents were urged to examine the books before they filed their permission forms. One teacher, at the inner-city Charleston High School, reported that after examining the texts 80 of the parents changed their minds and consented to allow their children to use them.[21]

Other schools, particularly in the rural areas where the protests had been strongest, were reported to have kept all the new adoptions away from the students. Teachers were said to be reluctant to use any of the new series for even those students whose parents had not voiced objections to them.[22]

In November and December, 1974, the Kanawha County Board of Education took two additional steps designed to placate the protesters. Both of those raised strong questions of free speech. In November the board adopted a set of guidelines that were to govern future text adoptions. The guidelines were originally proposed by Mrs. Alice Moore, who claimed that all the new language-arts adoptions violated the new guidelines. The guidelines are quoted in their entirety:

> Textbooks for use in the classrooms of Kanawha County shall recognize the sanctity of the home and emphasize its importance as the basic unit of American society. Textbooks must not intrude into the privacy of students' homes by asking personal questions about inner feelings or behavior of themselves or their parents, or encourage them to criticize their parents by direct questions, statements or inference.
>
> Textbooks must not contain profanity.
>
> Textbooks must respect the right of ethnic, religious or racial groups to their values and practices and not ridicule those values or practices.

> Textbooks must encourage loyalty to the United States and the several states and emphasize the responsibilities of citizenship and the obligation to redress grievances through legal processes. Textbooks must not encourage sedition or revolution against our government or teach or imply that an alien form of government is superior.
>
> Textbooks shall teach the true history and heritage of the United States and of any other countries studied in the curriculum. Textbooks must not defame our nation's leaders or misrepresent the ideals and causes for which they struggled and sacrificed.
>
> Textbooks used in the study of the English language shall teach that traditional rules of grammar are a worthwhile subject for academic pursuit and are essential for effective communication among English speaking people.[23]

The board, in a December meeting, approved a new procedure for screening and selecting textbooks, keeping in mind the need to adopt new social-studies texts early in 1975. The new procedure provided for considerable parental input. Texts would be chosen as a result of a four-step process: First, a curriculum committee composed of parents and teachers would establish "philosophy, rationale, objectives, skills, course outline, timeline, and evaluation forms for materials." A second committee, again composed of parents and teachers with a 75-25 ratio of parents to teachers, would "eliminate those textbooks and related materials which don't satisfactorily meet the board-of-education guidelines." The third step in the process would involve "curriculum-study teams" composed of parents and teachers, who would evaluate the materials recommended for further study. Finally, the textbook-selection committee, composed of both teachers and parents, would make a final review and present a recommendation for the approval of the board.[24]

The new screening/selecting procedures were challenged by the pro-text Coalition for Quality Education. A ruling by the State Superintendent of Education in March, 1975, clearly placed the responsibility for selecting elementary texts on the legally mandated five-member committee of teachers. That committee, the superintendent ruled, "must have the opportunity of examining all books listed on the state approved list, and not a restricted number that might come to it from the [screening] committee."[25] The superintendent's ruling did allow the functioning of the screening committees on the secondary level. In practice the Kanawha Board of Education has continued to use the screening committees to review texts for both elementary and secondary use.[26]

It is apparent from an examination of the guidelines and the selection procedure as well that considerable danger to free speech exists. Several other West Virginia county school boards indicated that they had either adopted or varied the Kanawha County guidelines and were seeking to broaden parental participation in their adoption procedures. The Wirt County superintendent indicated that that county's guidelines particularly prohibited profanity. The Clay County superintendent reported that "Our guidelines ... say that books will not undermine religion or the government." One county indicated that members of the ministerial association would be asked to comment on the proposed texts.[27]

When the Cabell County Board of Education adopted textbooks in May, 1975, it was reported that the selection committee had looked for books "strong in patriotism." The chairman of the social-studies selection committee commented that the "committee rejected other books containing 'phrases not harsh enough against dissent' and some containing terms controversial and not in good taste.'"[28]

As might be expected, the textbook protest did not focus solely upon the language-arts adoptions in Kanawha County. Offensive books in school libraries, in both Kanawha and neighboring Lincoln County, came under fire as the protests continued. Late in September the protest spilled over into Lincoln County, where parents were assured by the board of education that school-library booke found to be objectionable would be removed. One book, brought to the attention of a Lincoln County board member, was removed from a school even though it was the teacher's personal property.[29] Protesters brought about the removal of some books, alleged to be for sex education, that were found in a Kanawha County junior-high-school library.[30] In March the Kanawha board wrestled with the issue of establishing a policy to cover removal of books from libraries when requested by parents.[31]

The one area where the textbook protest has had an adverse effect upon free speech has been upon freedom to teach. This area of concern has received little attention from the press, but it has loomed as a major problem within the teaching profession in the Kanawha schools. The NEA Inquiry Report discussed this point in some detail, including testimony from teachers and officers of teacher organizations. One teacher-spokesman concluded: "Teachers are afraid to use materials. They will not serve on textbook committees. They distrust the Central Office staff, the Board of Education, and the community. They are afraid for their safety, peace of mind, and even their jobs. Effective education is at a minimum in Kanawha County."[32] One example, almost ludicrous and yet tragic, was reported by the principal of an elementary school: "A teacher came to me the other day and asked 'What do you think? Can we defend teaching this in class?' She was talking about a unit in biology on the asexual reproduction of mollusks (shellfish). It's really gotten that bad."[33] It is likely, from the vehement and continuing nature of the protest, that many teachers in Kanawha County and throughout West Virginia have altered and changed both their teaching methods and course content for the simple reason that they don't want to incur complaints from offended parents. The NEA could only conclude that the situation in Kanawha County would "... endanger --if not destroy--the atmosphere of free inquiry and the free exchange of ideas without which education cannot survive."[34]

The textbook controversy in Kanawha County, West Virginia, was, at its heart, a struggle on the part of a large group of parents, some fundamentalist ministers, and a member of the board of education to remove legally chosen textbooks from the schools. The protest grew until disruption, violence, and arrests had occurred. While the protesters did not achieve their goal of total removal of the offending textbooks from the schools, the evidence shows that the protest has made the use of the texts difficult at best; in many schools, impossible. Guidelines and adoption procedures for new textbooks establish a system that, in actual practice, allows considerable parental censorehip. The result of the controversy on the Kanawha County school system as a whole has been to cripple teacher morale and stifle the freedom to teach. The effect of the controversy has been felt throughout West Virginia. It is possible that similar results could occur wherever similar protests arise elsewhere. The precedent set in the West Virginia controversy indicates that free speech has suffered severe blows.

FOOTNOTES

[1]Some of the more interesting commentaries, from different viewpoints, can be found in Curtis Seltzer, "The West Virginia Book War: A Confusion of Goals," Nation, 2 November 1974, pp. 430-435.

[2]"Texts Selection Rationale Explained by Chairman," Charleston (W.V.) Gazette, 1 October 1974.

[3]"Here Are the Titles of the Disputed Texts," Charleston Gazette, 1 November, 1974.

[4]The discussion of the early protest events is taken from: "Text Controversy--Beginning to Present," Charleston Gazette, 1 November, 1974.

[5]Judith Casto, "Kanawha Board Return Textbooks Some Called 'Dirty, Anti-American', " Huntington (W.V.) Herald-Dispatch, 9 November 1974.

[6]Kay Michael, "Renewed Shutdown Efforts Vowed by Textbook Protesters," Charleston Gazette, 1 December 1974.

[7]Kay Michael, "Extremists, Left and Right, Appear To View for Center Stage in Text Feud," Charleston Gazette, 6 November 1974.

[8]Judith Casto, "Klansmen Seek Moore Talks In Text Dispute," Huntington Herald-Dispatch, 28 December 1974.

[9]Reverend Marvin Horan, one of the protest leaders, along with four other persons, was convicted on Federal charges of conspiracy in attempted bombings of several schools and a bridge. Michael White, "Rev. Horan, Stevens Convicted," Charleston Gazette, 19 April 1975.

[10]"Restore Order In Kanawha County," Huntington (W.V.) Advertiser, 16 September 1974.

[11]Calvin Trilling, "U.S. Journal: Kanawha County, West Virginia," New Yorker, 30 September 1974, pp. 119-127.

[12]Ben Franklin, "The Appalachia Creekers: Literally, A World Apart," New York Times, 27 October 1974, IV, p. 10.

[13]"Kanawha Book Protest Class Warning," Wall Street Journal, 7 October 1974.

[14]Carl Marburger, "The West Virginia Textbooks," New York Times, 24 October 1974.

[15]"The Textbook Controversy: A Political Confrontation," Christian Century, 13 November 1974, pp. 1064-1066.

[16]Russell W. Gibbons, "Textbooks in the Hollows," Commonweal, 6 December 1974, pp. 231-234.

[17]This view is discussed at some length in: Inquiry Report: Kanawha County, West Virginia: A Textbook Study in Cultural Values, (Washington, D.C.: National Education Association, Teacher Rights Division, 1975).

[18]West Virginia Board of Education, resolution, adopted 11 December 1970.

[19]When the protesters were accused by the Charleston chapter of the NAACP of being motivated by racism, the charge was repeatedly denied. There is little doubt, however, that much of the protest against the books written by Eldridge Cleaver, Malcolm X, and others, and against elementary texts portraying black and white children together, stemmed from racial fears on the part of the protesters. An article discussing the text controversy at some length appeared in The Citizen for February, 1975, published by the Citizens Council of America, Jackson, Mississippi. The article is titled "Pro-Integration Textbooks Opposed," and asserts that "There is another important--although obscured and almost concealed--reason why the parents, as well as their ministers and many public and business leaders, are determined to rid their schools of the offending texts. This barely-mentioned but major motivation of the protesters stems from their resentment of the use of textbooks to teach racial integration."

[20]"What Your Children Will Read ..." (advertisement) Charleston Gazette, 14 November 1974. Judith Casto, "Textbooks protested in Kanawha picked for college-bound," Huntington Herald-Advertiser, 29 September 1974.

[21]Kay Michael, "Textbook Usage Plans Studied," Charleston Gazette, 4 January 1975.

[22]This problem was discussed at some length at a meeting, held on 24 January 1975, between representatives of the ACLU, the WVCLU, and the pro-text Coalition for Quality Education.

[23]Kay Michael, "Here's a New Text Process," Sunday Gazette-Mail, 15 December 1974.

[24]Michael, "New Process."

[25]Kay Michael, "Text Screening Violation Cited by State Chief," Charleston Gazette, 14 March 1975.

[26]Telephone interview with a member of the staff of the Kanawha County Board of Education, 20 May 1975.

[27]Kay Michael, "Kanawha Text Procedures Spread: Other Counties Adopting Guides," Charleston Gazette, 31 January 1975.

[28]Judith Casto, "Picking the Books," Huntington Herald-Dispatch, 24 May 1975.

[29]H. Ray Evans, "Youths in Class, Books Going Out in Lincoln Area," Huntington Herald-Dispatch, 26 September 1974. The book was one of the Time-Life series, The Fabulous Century: 1960-1970.

[30]George Steele, "Books in Marmet Junior High Draw Fire," Charleston Gazette, 16 October 1974.

[31]Kay Michael, "Vote on Library Books Expected," Charleston Gazette, 13 March 1975.

[32]Inquiry Report, p. 28.

[33]"Teaching Chaos Hit; Principal to Resign," Charleston Gazette, 13 December 1974.

[34]Inquiry Report, p. 36.

OBSCENITY AND PORNOGRAPHY: LEGAL ARGUMENTS AND EMPIRICAL EVIDENCE

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> Literature cannot develop in between the categories of "permitted" and "not permitted," "about this you may write" and "about this you may not write."
>
> --Alexander Solzhenitsyn
> Letter to the Fourth Congress of
> Soviet Writers

There are certain similarities and differences between the legal and scientific methods relevant to a discussion of an area of mutual intereat. Both share an explicit concern for the avoidance of error, law protecting the innocent until proven guilty, science assuming the null until shown rejected. Both are concerned with facts, but law "judges" them in terms of constitutional values while science analyzes them in terms of their explanation and prediction. Law often baaes its conclusions on authority and precedent; acience baaes its conclusions on the scientific method and confirmation with replication. The legal method often results in raversals; the scientific method hopefully results in refinement. Both fields now have extensive literatures dealing with pornography within their perspective frameworks.

An underlying assumption throughout the legal history of pornography is that such literature can have harmful individual and societal effects. In 1967 President Lyndon B. Johnson created the Commisaion on Obscenity and Pornography under congressional mandate in order to (1) analyze extant obscenity laws, (2) ascertain the volume of traffic in pornography, (3) study the effects of obscenity and pornography on the public and its relationship to crime, and (4) recommend appropriate action.[1] The purpose of this article is to review significant research on pornography in terms of key Supreme Court cases on obscenity in order to evaluate the recommendations of the Commission.

Legal Arguments

Two problems plague the legal literature on obscenity and pornography: definition and criteria. The problem of definition is epitomized by Justice Potter Stewart's diacomfort in "trying to define what may be indefinable."[2] Neither obscenity nor pornography has ever been satisfactorily defined. This was evidenced most recently by the Court's return to local standards and notwithstanding attempts at providing synonyms (cf. Roth-Alberts) and examples (cf. Miller).[3] The Technical Reports of the Commission adroitly avoid controversial connotations by referring to operationalizations generically as "erotic stimuli."

The central problem, however, is not one of definition. Concept definition is arbitrary. The key is the adequacy and consistency of the criteria offered for evaluating the usefulness of the definition. It is in this regard that the law on obscenity and pornography has been a morass of conflicting confusion.

Three major criteria have underlined arguments dealing with censorship of sex-related material, although their development has been neither consistent nor chronological. One, which is most susceptible to empirical

tests, concerns whether or not the effects of such material are harmful to the individual or society. These effects could be in terms of behavior (e.g. incidence of crime--and much of the research instigated by the National Commission investigates this question--but American law has generally emphasized that "thoughts" or cognitions are the relevant concern. It remains unclear as to the nature of these thoughts, whether arousal, sexual or otherwise, or effect on socially relevant attitudes toward sex and morality is the concern.

Another issue, although not contained in law, is whether or not these effects are to be considered immediate or long-range. An issue that is contained in law concerns the audience of sexually explicit material, whether the receiver is an average person, a "knowledgeable"adult, or a susceptible child. In this area of effects the scientific is a necessary and sufficient method [illegible]

The second general criterion, which is less amenable to empirical testing, concerns the value of the material itself. Here the issue is content, whether the work contains immodest or immoral expression, whether the work is partly or totally obscene, whether it contains "redeeming social value" or is generally worthless and therefore not protected by freedom of speech.[4] While content-analytic procedures could theoretically be developed to determine the amount and kind of erotic material in the text, evaluations of that material are judgmental rather than empirical. Determination of "community standards" of content, whether local or national, however, is empirical. Thus science is here a necessary adjunct to law but not a sufficient one for final disposition.

The third criterion concerns conduct. Here the issue involves the behavior of the defendant: whether the use of the content is public or private, whether public dissemination of the content can be considered an invasion of privacy, selling to a minor, or pandering. While fear of effect may underlie this aspect of the law on pornography, aside from the determination of fact the question is legal rather than empirical. Final disposition depends on legal judgment of the behavior, and science is neither necessary nor sufficient for that determination.

Cognitions

Having no precedent to follow when pornography cases began to reach the American courts, the 1868 English "Hicklin rule" was adopted. Lord Chief Justice Cockburn therein formulated the test:

> whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort might fall.[5]

Hicklin thus established two of the principles that were to reoccur in many of the American court decisions on pornography: "corrupt cognitions" and "susceptible persons."

Although several judges have bemoaned the lack of evidence relating the decoding of sex-related material and antisocial behavior,[6] the Supreme Court has made it clear (although conceptualizations are vague) that salacious thoughts rather than antisocial behavior is the sine qua non effects test of obscenity. The argument that antisocial consequent behaviors must be shown has most recently been repudiated in Miller v. California.[7]

In the significant Ulysses decision, Judge John Woolsey provided several important dicta, including a definition of obscenity as that which "tends to stir the sex impulses or to lead to sexually impure and

lustful thoughts."[8] Precedent was established in the landmark Alberts-Roth cases. In Alberts's original trial the test for obscenity was whether or not the material has "a substantial tendency to deprave or corrupt its readers by inciting lustful thoughts or arousing lustful desires."[9] In Roth, the jury was instructed that "the words 'obscene, lewd and lascivious' as used in the law signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful thoughts."[10] In approving the conviction of Alberts and Roth the Supreme Court added the definition: "Obscene material is material which deals with sex in a manner appealing to prurient interest."[11]

Perhaps implicitly recognizing the difficulty in operationalizing such vague conceptualizations, jurists have offered additional criteria as tests for obscenity throughout the Court cases. An additional theme relevant to questions of effect concerns the audience of potentially pornographic materials. The Ulysses definition included a "test by the court's opinion as to its effect...on a person with average sex instincts."[12] This opposed the "most susceptible person" test of Hicklin and potentially allayed some of the fear expressed in Judge Learned Hand's discontent in reducing "our treatment of sex to the standard of a child's library."[13] In 1957 the Supreme Court further slapped down the Hicklin rule in a decision that state law could not quarantine "the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence."[14] That same year, ptecedent was established in Roth with the phrase "...whether to the average person..."[15]

Some of the libertarian's joy, however, was offset by Mishkin. In that case Justice Brennan's majority opinion stated that prurient interest should be "assessed in terms of sexual interests of its intended and probable recipient group."[16] Mishkin's defense had argued that the materials in question would disgust the "average person." Hence, Roth did not prohibit them. The bothersome possible implication of this case is that even if sex-related materials are shown not to appeal to the prurient interests of the average person, that is not sufficient to allow the work. If any group of people shows prurient interest in the material, it can be prohibited. By itself (and other considerations, cf. content, are relevant), the decision would mean that any work dealing with sex in an explicit manner that sells could be found obscene.

In other decisions it has been made clear that children are not included in the audience of "average persons." In Ulysses, which first offset the "susceptible" notion of Hicklin, the test was "on a person with average sex instincts."[17] In Redrup v. New York the viability of statutes stating "a specific and limited state concern for juveniles" was recognized.[18] In Ginsberg v. New York, the concept of "variable obscenity" was added to the legal literature whereby adolescents could be denied access to explicit sex-related materials aimed at an audience of sexually mature adults.[19]

Content

One cannot talk about effects without talking about content, and that has been the case in the legal history of pornography. Little effort overall, however, has been directed toward explicating the nature of obscene content. Rather the decisions have been concerned with (1) the "judge" of obscene content; (2) the criterion, aside from effect, to be used in judgment: "community standards," national or local; (3) whether the theme of obscenity is "dominant," "hard-core", or otherwise; (4) whether the content is "utterly without redeeming social importance" or "patently offensive."

In a significant early case, which was one of the first breaks in the fight against censorship of sex-related material, Judge Augustus N. Hand ruled that it was for the trial judge to determine whether the material was obscene before submitting any question of actual violation to the jury.[20]

The significance of this is that the question of what constitutes obscenity is considered one of law rather than fact. While this means that obscenity cases are reviewable by higher courts, since appellate courts may not characteristically alter a jury's conclusions as to the facts of the case, it also means that the judge may estimate community standards regarding sex-related content. There is no legal requirement that such standards be determined empirically. As already seen (cf. fn. 10), the judge may instruct the jury on questions of obscenity, although Justice Brennan forcefully expressed the (majority) opinion in Jacobellis that it is the responsibility of the Court to evaluate the jury's verdict or the lower court's decision:

> Since it is only "obscenity" that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law.... Our duty admits of no substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.21

The possibility of empirically determining such standards was left open, however, in Justice Harlan's statement that the government could ban any material which "has been reasonably found in state judicial proceedings to treat with sex in a fundamentally offensive manner, under rationally established criteria for judging such material" (emphasis added).22 Recently, in Hamling v. U.S., the defense submitted a local (San Diego) survey pertaining to community standards of sex-related material, but the Court upheld the conviction in that a national advertisement was at issue.23

The criterion of "community standards," whether utilized by the judge, jury, or community, has a vagueness not likely anticipated by Roth. In Jacobellis, Justice Brennan held that because obscenity is a constitutional question, no "local" definition of the "community" could properly be employed in delineating the area of expression .... It is, after all, a national Constitution we are expounding."24 A majority of the Court failed to agree with Brennan, however, and in Miller the Justices "shifted their collective inabilities to the communities so the communities might declare that they independently and differently know this 'thing' when they see it."25

In terms of the content itself American law had added the "partly obscene" test to Hicklin: such that any work dealing in part with sex-related material could be subject to the censor's ban.26 Ulysses rejected the notion of "isolated passages," however, and Roth considered "the dominant theme of the material taken as a whole," because a work "might well encompass material legitimately dealing with sex."27

Two additional terms were added to the legal lexicon on obscenity in the 1960s. In Manual Enterprises v. Day, Justice Harlan, writing for the Court, held that materials must "be deemed so offensive on their face as to affront current community standards of decency" --a quality referred to as "patent offensiveness"--before they could be adjudged obscene.28 In the Memoirs case, which involved the first book (Fanny Hill, or Memoirs of a Woman of Pleasure) subject to an obscenity trial in the United States, it was held that a "book cannot be proscribed unless it is found to be utterly without redeeming social value."29

Such material was described by Justice Stewart, in his dissenting Ginsburg v. U.S. opinion, as "hard-core" pornography, including writings and

> photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character ....

> verbally describing such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value.[30]

Chief Justice Berger provided further examples recently in Miller, including "representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated," and "representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." However, the emphasis on a complete lack of social value in Memoirs was changed to a requirement that the materials must contain "serious literary, artistic, political or scientific value" to avoid an obscenity ruling.[31] The judgment now seemingly involves the quality of social contribution as well as the quantity of "patently offensive" sex-related material versus "socially redeeming" material inherent in the phrase "dominant theme."

The examples provided by Stewart and Burger are among the closest the Court has come to the "operational" definitions of content needed for determining effects. The Court's emphasis on context is empirically important as well, although the concept "serious" is far from operational. A third strand of cases dealing with obscenity complicates the issue, however, in that two types of obscene content seem to be recognized.

Conduct

In an increasingly important concurring opinion in Roth, then Chief Justice Earl Warren insisted that the context of the defendant's conduct, rather than the nature of the material itself, should be the central issue in obscenity cases.[32] The manner in which material was sold (or used) became another element in the law on obscenity. In Ginsburg, Justice Brennan, upholding conviction, defined pandering as "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers."[33] Such conduct was prohibited.

Relying on Ginsburg, the Court in Redrup presented four situations in which convictions for selling or mailing obscenity could be upheld: (1) where the publication is "hard-core" pornography, (2) where there is evidence of pandering, (3) where there is concern for juveniles, and (4) where there is an invasion of privacy. The author of the per curiam majority opinion spoke of two kinds of obscenity: hard-core and something else (not defined). It seemed that if the content was not hard-core, and if the conduct of the defendant did not violate (2) - (4) above, the materials involved were protected by the First and Fourteenth Amendments from governmental suppression"[34]

The empirical significance of this would seem to be that scientists need only investigate one type of obscene content (hard-core) and only this type needs to be studied in terms of effect, although it is prohibited independently of effect. It is "socially worthless" and therefore not protected by free speech. The other type of obscenity, not defined but by implication sex-related material less than "hard-core", is protected by free speech but is prohibited if the conduct of the defendant in selling or exhibiting is prohibited. Questions of effect are not relevant. Legal implications are much more complicated but involve issues not germane to the present discussion.[35]

Empirical Evidence

While the discussion of the legal history of obscenity is oversimplified, as any such discussion must be, it does become clear that the Supreme Court has used several distinct criteria for prohibiting obscenity or sex-related materials. Not all of these criteria have empirical foundation. The National Commission implicitly recognized this in its (majority) recommendations advising:

(1) Repeal of federal, state, and local legislation prohibiting sale, exhibition, or distribution of sexual materials to consenting adults;[36]

(2) State adoption of legislation prohibiting commercial distribution or display of certain sexual materials to young persons;[37]

(3) State and local adoption of legislation prohibiting public display and unsolicited mailing of sexually explicit materials.[38]

Protection of juveniles and conduct were thus recognized as legitimate legislative concerns. The implication of the content criterion--that obscenity is "an offense to public morality or taste," is "socially worthless" and therefore not protected speech--was not recognized by the Commission, although (indirect) investigations of community standards were included in the Commission's Reports. The recommendation for repeal of obscenity legislation was based on the (lack of) evidence indicating harmful or adverse effects on the user of pornography. The relevant empirical evidence will now be discussed in terms of (1) Behavior, (2) Cognitions (arousal), (3) Juveniles, and (4) Community Standards.

Behavior

While the Court has made it clear that antisocial behavior resulting from exposure to pornography is not the basis for obscenity decisions, it would seem to be an underlying concern if state "control of thought" is to be avoided. This may be attributing more "reason" to the Court than Judge Frank or Justices Douglas and Black (cf. fn. 6) would like; however, fear of resultant crime is a concern of the public. While two independent studies of college-student attitudes found little concern over possible harmful effects (as many found pornography humorous as found it arousing),[39] a national survey involving twenty-five hundred adults found that 40 per cent believed that pornography led people to commit sex crimes.[40] Fear of effect is a concern of the public, but should it be?

Conceptually the issue involves comparison of two similar groups of people, one of which is exposed to explicit sexual material, and comparison of subsequent (antisocial) behavior. "Behavior" includes (increased) sexual activity, and relevant evidence is considered under "arousal." "Antisocial" concerns the commission of a crime, sexual or otherwise, although analyses of the reported data is in terms of sex crimes. The practical difficulties of doing the experimentation (laboratory and natural) or panel studies minimally necessary for causative statements, are profound. These result in a preponderance of correlational evidence subject to conflicting interpretation.[41]

In spite of anecdotal evidence, an examination of (juvenile) court records indicated no direct relationship between exposure to pornography and the commission of sexual offenses.[42] Incidence of exposure to pornography is not systematically kept by the courts, however, and these particular data do not allow comparison to sexual offenders or nonoffenders. On the other hand, a summary of 51 studies, including several where such comparisons were made, found no indication "that the relationship between pornography and delinquency merits special investigation in the future."[43] Furthermore, although the amount of available pornography increased substantially in the 1960's, the number of arrests for sex crimes increased 15 per cent compared to an increase of 24 per cent for nonsexual offenses.[44] In another study it was found that control groups consisting of non-sex offenders, college males, and men's-club members reported more exposure to pornography at an earlier age and greater arousal than sex offenders.[45]

In a large-scale interview survey, involving fifteen hundred institutionalized sex offenders (S), 888 institutionalized non-sex offenders (I), and 477 non-institutionalized controls (C), 28 per cent of the (S)

reported strong arousal from pornographic pictures. However, 36 per cent of the (I) and 34 per cent of the (C) reported similar arousal. Little arousal was indicated by 43 per cent of the (S), 38 per cent of the (I), and 33 per cent of the (C). One half of the (I) and one third of the (C) reported having possessed pornography, sex offenders falling between these extremes. Some differences occurred in that child molesters and (C) reported the highest arousal to pornography while rapists and homosexuals reported the least arousal to (heterosexual) pornography.[46] The latter finding implies that pornography is not an effective means of catharsis for at least one type of sex offender (rapists) and conceivably is a stimulant for another (child molesters).

In a more recent similarly extensive study it was found that preadolescent exposure to pornography (generally involving nudity) was similar across all groups but was significantly less for non-sex offenders and sex offenders excepting homosexuals (preferring non-heterosexual stimuli) than for controls during both adolescence and adulthood.[47] While these data do not show that particular pornographic materials have no impact on behavior in some cases, they do indicate that amount of exposure is not positively correlated with sex deviance except in the case of homosexuality and non-heterogeneous pornography.

The possibility of investigating the relationship between pornography and sex offenses in a natural situation occurred with the liberalization of obscenity laws in Denmark. One researcher concluded that the noted decrease in sex crimes in that nation is possibly due to a combination of "increased sexual permissiveness and widespread dissemination of pornography."[48] The possibility that the decrease could be accounted for by a change in attitude toward sex crimes and/or the reporting of sex crimes was also investigated.[49] While this might have been the case for minor offenses such as voyeurism and exhibitionism, it was found less likely for more serious offenses.

Cognitions (Arousal)

The Court has not made clear its meaning for "appeals to prurient interest." Research on pornography has generally studied effects on arousal, although this is a general physiological term that can include reactions of anxiety, fear, and guilt.[50] Self-reports have been the most common measure, but several additional techniques (such as pupillary response, galvanic skin response, penile plethysmography, and behavioral response) have also been utilized.[51] Together they strongly indicate that people experience arousal when presented with sexually explicit stimuli. Several reactions may occur, depending on the nature of the stimuli, the demographic and personality characteristics of the respondents, and the context in which the stimuli are presented.

Erotic stimuli may appear in a variety of forms, including written, pictorial, or live, ranging from partial or complete nudity to various sexual activities. In the classic Kinsey studies, 60 per cent of the males reported arousal from sexually explicit printed material, whereas only 20 per cent of the females reported arousal from either reading erotic stories or seeing pictures of nudity.[52] However, 60 per cent of the females reported arousal from "romantic" stories. Mosher and Greenberg found that the presence of a non-threatening female experimenter can inhibit arousal among females. They suggested that arousal is greater from romantic passages because sexually explicit material instigates arousal inhibiting anxiety.[53] Schiller also found that female sexual arousal is tied to feelings of romance and love and that younger girls (ages 13-18) can be erotically stimulated by music, primarily rock and roll.[54] The factor of fantasy in arousal has been found by Goldstein and Kant among both controls and sex offenders, especially rapists.[55] Pornographic material was more likely to stimulate sexual intercourse among the controls, masturbation among the sex offenders. Rapists were most stimulated by fantasies, although the possibility that the subject matter of their fantasies is partly derived from use of pornography does exist.

In a study of male graduate students various pictorial scenes were ranked according to arousal properties. Heterosexual ventral coitus was ranked at the top. This was followed by dorsal coitus (2), heterosexual nude petting (3), heterosexual fellatio (5), nude female (6), heterosexual cunnilingus (7), nude male (18), and partly-clad male (19).[56] Rankings involving written material have not been reported.

Likelihood of arousal also depends on sex, education, and "sex guilt." Males have been found to be more aroused by explicit depictions of sexual activity, females more by fantasy and romantic stories.[57] More recently males and females have been found equally aroused by film, although males were more aroused by oral-genital activity and were less likely to regard sexual activities in film as pornographic, disgusting, or offensive than females.[58] Kinsey found that pornography stimulated masturbation only among the better educated, prisoners in particular reporting little arousal short of actual human contact.[59] People insecure in their sex role have been found more likely to be upset by exposure to heterosexual erotic stimuli.[60] Subjects with high sex guilt were more likely to experience an increase in sex guilt after exposure to erotic material and more likely to find the material offensive.[61]

Unfortunately the message context surrounding erotic stimuli, implicit in the Court's notion of "redeeming social value," has not been studied. It has been found, however, that the social context, or situation, does have an effect on arousal. The presence of an experimenter can inhibit expressions of arousal even when a permissive attitude is expressed.[62] Subjects were found less likely to include sexual content in created short stories in classroom situations or when in the presence of an older, more formal experimenter.[63]

Several studies have found an increase in sexual behavior in the 24-hour period following exposure to sexual material.[64] In a longitudinal study involving 84 voluntary married couples it was found that those who viewed erotic films reported an increase of sexual activity on viewing nights and more tolerant attitudes toward exhibition of such films.[65] No indication of "harmful social consequences" was found. Another study made pornographic material available to experimental subjects 90 minutes a day for 15 days.[66] Initial increase in arousal and sexual thoughts was followed by a decrease with continued exposure. No detrimental effects on attitude or behavior were found.

Children

Few studies have been done with children in the area of pornography, but research in the violence area does indicate that they are likely to learn novel behavior from mass media messages.[67] In an early study Ramsey found that 11-to-14-year-old boys ranked conversations about sex as most arousing, followed by female nudity and obscene pictures.[68] Goldstein and Kant surmise that direct representations of sexual activity become arousing as sexual experience increases.[69] No relationship has been found between exposure to pornography and juvenile delinquency. Gilligan, et al. found that the level of reasoning used by high-school juniors to evaluate various social dilemmas was lower for lower-I.Q. students, social class, and for dilemmas that involve social problems.[70] Whether exposure to pornography affects the latter, however, is not known. Davis and Braucht found a relationship between exposure and poor-character scores as well as deviant sexual practice (voyeurism, etc.) but concluded that the relationship was not causal in that exposure tended to be age 17 or later.[71]

Community Standards

The recent Miller decision increases the importance of determining community standards, such determination being local as well as case by case. In the Wilson and Abelson national survey no consensus in attitudes toward pornography was found.[72] While the majority would allow some sexually explicit materials, a sizable minority (30 per cent) would not. Few differences were found regarding mode (print versus film) of presentation, but content did make a difference (53 per cent would allow depictions of coitus, while only 35-40 per cent would allow oral-genital depictions).

Eighty-four per cent of the men and 60 per cent of the women reported experience with some type of pornography by (median) age 17 and 21 respectively. The material was usually pictorial for men, textual for women. Education, income, liberalness, consumption of books, early sexual experience, and frequency of intercourse were positively related to exposure; age and attending religious services were negatively related. No relationship was found between exposure and satisfaction with one's sex life.

In a study of college-student attitudes it was found that exposure was common and likely to occur relatively early (88 per cent by age 14).[73] They had little agreement on what constitutes pornography and generally felt that written descriptions are less pornographic than pictorial. A similar study found that exposure was common among high-school students (68 per cent had experience with pornography by high school, 30 per cent by grade school).[74] Females were more likely to feel embarrassment or disgust (52 per cent than males (19 per cent), both sexes generally feeling that it should be restricted by age.

The average consumer of pornography (and the person most likely to have permissive attitudes) in one study has been found to be a white, middle-aged, married, well-educated, high-income male who has an active and varied (50 per cent with more than one partner) sex life and who feels that exposure to erotica increases social and sexual interaction.[75]

Conclusion

Several criteria have been utilized by the Court in prescribing sexually explicit material. The National Commission recommended legislation prohibiting public display (cf. pandering) and unsolicited mailing. Although no legislation recommendation was made concerning public versus private use of pornographic material, the conduct criterion of the Court was essentially agreed with by the commission.

The content criterion, involving both judgmental and empirical foundations, is more difficult to evaluate. The commission did not recommend prohibition on the basis of content. It gathered a substantial amount of evidence indicating that people are exposed to pornographic material and are not opposed to availability if restricted to adults. The commission's recommendations agreed with this restriction. There is a sizable minority opposed, but this may be based on feelings that harmful effects were likely to occur.

The key criterion, especially if law is regarded as "protective" rather than "prescriptive," is the cognition criterion. The implicit assumption of the commission is that cognitions are harmful to the extent that they lead to harmful behavior. Correlative evidence indicates that sex offenders, on the whole, are less likely to be exposed to pornographic materials than others. While this does not support a causal connection, it unfortunately is not sufficient to rule out exposure as an intervening link in a causal chain. Exposure may be a precipitating factor in some predisposed sexual offenders. The Danish experience, however, indicates that this is not an instigating link.

The relationship of arousal to prurient interest is also difficult to evaluate. People are sexually aroused by sexually oriented materials. Drive reduction is sought. Whether or not an increase in promiscuous behavior, a sensical interpretation of prurient consequences, however, cannot be determined by the reported evidence. Those interested in pornography are likely to be sexually active, but the role pornography plays in promiscuous activity was not looked at directly.

Possible effects on children were also not substantially investigated by the commission. Other research indicates that children can learn novel behaviors from mass-media messages. Elsewhere it has been found that people can be "innoculated" against persuasive messages and that those not innoculated are more susceptible.[76] Given this and the aversion of some sex offenders and high sex-guilt individuals to pornographic materials, lack of exposure to sexually related material seems as important an issue as permitted exposure. The commission strongly recommended that a massive sex-education program be launched.[77] Enactment of this recommendation in conjunction with one previously cited seems the most reasonable approach to a controversial area in view of empirical evidence and Supreme Court arguments on pornography and obscenity.

FOOTNOTES

[1]The Report of the Commission on Obscenity and Pornography (hereafter, Report) (New York: Bantam Books, 1970), p. 1.

[2]Jacobellis v. Ohio, 378 U.S. 184, 197, 84 S. Ct. 1676, 1683 (1964).

[3]For more detailed discussions of key issues and cases see William B. Lockhart and Robert C. McClure, "Literature, the Law of Obscenity, and the Constitution," Minnesota Law Review, 38 (1954), 295-395; Ebehard and Phyllis Kronhausen, Pornography and the Law (New York: Ballantine Books, 1959); James C. N. Paul and Murray L. Schwartz, Federal Censorship: Obscenity in the Mail (New York: Free Press of Glencoe, 1961); Robert B. Cairns, James C. N. Paul, and Julius Wishner, "Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence," Minnesota Law Review, 46 (1962), 1009-1041; Albert Gerber, Sex, Pornography, and Justice (New York: Lyle Stuart, Inc., 1965); Harold L. Nelson and Dwight L. Teeter, "Criminal Words; Obscenity and Blasphemy," in Law of Mass Communications: Freedom and Control of Print and Broadcast Media (Mineola, New York: Foundation Press, 1969); E.M. Obeler, The Fear of the Word: Censorship and Sex (Metuchen, New Jersey: Scarecrow Press, 1974).

[4]Roth v. United States, 354 U.S. 476, 77 S. Ct. 1304, 1307 (1957).

[5]Regina v. Hicklin, L. R. 3, Q B. 360, 370 (1868)

[6]Most notable are Judge Jerome Frank (concurring) in United States v. Roth, 237 F. 2d 796, 802, 806 (1956) and Justice William O. Douglas (dissenting, joined by Justice Hugo L. Black) in 354 U.S., 77 S. Ct. at 497, 508-511; 1315, 1321-1323. In Winters v. New York, 333 U.S. 507, 509-510, 68 S. Ct. 665, 667 (1948), Justice Stanley J. Reed held in the majority opinion that "a statute limiting freedom of expression must give fair notice of what acts will be punished...."

[7]413 U.S. 15, 93 S. Ct. 2607 (1973). This was the sentiment expressed in Roth although Judge Bailey Aldrich in reviewing the film I Am Curious (Yellow) interpreted Stanley 394 U.S. 557 (1969) to require such behavioral effects in Byrne v. Koralexis, 306 F. Supp. 1363 (D. Mass. 1969) vacated and remanded, 401 U.S. 216 (1971) at 1366-1367.

[8]United States v. One Book Called "Ulysses," 5 F. Supp. 182, 184 (S.D.N.Y. 1933).

[9]People v. Wepplo, 178 P.2d 853, 855 (1947).

[10]Justice William J. Brennan, Jr. quoting the judge's charge in 354 U.S., 77 S. Ct. at 486, 1309.

[11]Brennan at 487, 1310.

[12]5 F. Supp. at 184.

[13]United States v. Kennerley, 209 F. 119 (S.D.N.Y. 1913)

[14]Justice Felix Frankfurter speaking for a unanimous Court in Butler v. Michigan, 352 U.S. 380, 383, 77 S. Ct. 524, 526 (1957).

[15]354 U.S. 77 S. Ct. at 489, 1311.

[16]383 U.S. 502, 509, 86 S. Ct. 958, 964 (1966).

[17]5 F. Supp. at 184.

[18]386 U.S. 767, 769, 87 S. Ct. 1414, 1415 (1967).

[19]390 U.S. 629, 635n., 88 S. Ct. 1274, 1278n. (1968), quoting Lackhart and McClure, "Censorship of Obscenity, The Developing Constitutional Standards," Minnesota Law Review, 45 (1960), p. 85.

[20]United States v. Dennett, 39 F. 2d 564, 76 American Law Reports 1092 (1931).

[21]378 U.S. 184, 188, 84 S. Ct. 1676, 1678 (1964).

[22]Ibid., at 204, 1686.

[23]94 S. Ct. 2887, 2903 (1974).

[24]378 U.S., 84 S. Ct. at 184, 194-195; 1677, 1682.

[25]William A. Linsley, "The Supreme Court and the First Amendment: 1972-1973," Free Speech Yearbook 1973 (1974), p. 70.

[26]Lockhart and McClure, "Literature, the Law of Obscenity, and the Constitution," p. 343.

[27]354 U.S., 77 S. Ct. at 489, 1311.

[28]370 U.S. 478, 482-486, 82 S. Ct. 1432, 1434-1436 (1962).

[29]Commonwealth v. Holmes, 17 Mass. 336 (1821) Memoirs v. Massachusetts, 383 U.S. 413, 419, 86 S. Ct. 975, 978 (1966).

[30]383 U.S. 463, 497n, 86 S.Ct. 942, 956n (1966).

[31]413 U.S., 93 S. Ct. at 93, 2615.

[32]354 U.S., 77 S. Ct. at 495, 1314-1315.

[33]383 U.S., 86 S. Ct. at 467, 945.

[34]386 U.S., 87 S. Ct. at 770, 1416.

[35]See Dwight L. Teeter and Don R. Pember, "Obscenity, 1971: The Rejuvenation of State Power and the Return to Roth," Villanova Law Review, 17 (1971), pp. 222-227.

[36]Report, p. 51.

[37]Report, p. 52.

[38]Report, p. 36.

[39]David Manning White and Lewis D. Barnett, "College Students' attitudes on Pornography," Technical Report of the Commission of Obscenity and Pornography (Hereafter, Technical Report), 1 (1971), 181-184; William J. Roach and Louise Kreisberg, "Westchester College Students' Views on Pornography, Technical Report, 1, 185-189.

[40]W. Cody Wilson and Herbert J. Abelson, "Experience with and Attitudes toward Explicit Sexual Materials," Journal of Social Issues, 29 (1973), 19-39. This study also found that over 65 per cent felt pornography excited people sexually, 50 per cent felt it would improve the sex relations of some couples, 25 per cent felt it could give relief to people who have sexual problems.

[41]See "Report of Commissioners: Morton A. Hill, S.J. and Winfrey C. Link concurred in by Charles H. Keating, Jr., "Report, pp. 464-490 for a Technical Report data analysis at odds with Commission recommendations. While the present summary is necessarily subject to errors of omission, it is felt that the findings cited are representative of the issues considered.

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[43]Lenore Kupperstein, "The Role of Pornography in the Etiology of Juvenile Delinquency: A Review of the Research Literature," Technical Report, 1, p. 109.

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Hynes v. Mayor and Council of Oradell, 48 L. Ed. 2d 243, 96 S.Ct. 1755 (1976). A municipal ordinance requiring advance written notice to local police by "any person...desiring to canvass, solicit or call from house to house for a recognized charitable cause, or...for a Federal, State, County or Municipal political campaign or cause... for identification only" held to be invalid because of vagueness. A municipality may, however, enforce reasonable regulations regarding door-to-door soliciting and canvassing to protect its citizens from crime and annoyance. 7 to 1 decision.

Kelly v. Johnson, 47 L. Ed. 2d 708, 96 S. Ct. 1440 (1976). A county regulation limiting the length of county policemen's hair held not violative any Constitutional right guaranteed respondent policeman. Protection sought as a law enforcement employee, not as an ordinary citizen, is distinction of considerable significance since State has wider latitude in imposing restrictive regulations on its employees than citizenry at large. 6 to 2 decision.

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Nebraska Press Association v. Stuart, 49 L. Ed. 2d 683, 96 S. Ct. 2791 (1976). Order of state judge restraining news media from reporting information as to pretrial events relating to murder proceeding held to violate First Amendment. 9 to 0 decision.

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Roemer v. Board of Public Works of Maryland, 49 L.Ed. 2d 179, 96 S. Ct. 2337 (1976). Maryland statute providing for annual noncategorical grants to private colleges with stipulation that funds not be used for sectarian purposes held not violative of First Amendment's establishment of religion clause since purpose of statute and grants were to support private higher education generally. 5 to 4 decision.

Runyon v. McCrary, 49 L.Ed. 2d 415, 96 S.Ct. 2586 (1976). Court upheld interpretation of 42 USCS section 1981 to prohibit private schools from excluding qualified children solely because they are Negroes, and, as so applied, does not violate the First Amendment freedom of association, the Fifth Amendment right of due process, nor the Constitutional right of privacy. 7 to 2 decision.

Serbian Eastern Orthodox Diocese v. Milivojevich, 49 L.Ed. 2d 151, 96 S.Ct. 2372 (1976). State court's determination in this case was of ecclesiastical matters and therefore violative of First and Fourteenth Amendments. Resolution of ecclesiastical cognizance and polity is for ecclesiastical and not civil tribunals. 7 to 2 decision.

Time, Inc. v. Firestone, 47 L.Ed. 2d 154, 96 S.Ct. 958 (1976). The Constitution does not contain a blanket privilege for making defamatory statements in connection with the reporting of judicial proceedings. A rational interpretation of an ambiguous document does not necessarily insulate a publisher for defamation. 5 to 3 decision.

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 48 L. Ed. 2d 346, 96 S.Ct. 1817 (1976). The advertisement of prescription drug prices is protected under the First Amendment notwithstanding its "commercial speech" character. Thus in some circumstances speech of an entirely private and economic character enjoys the protection of the First Amendment. 7 to 1 decision.

Young v. American Mini Theatres, Inc., 49 L. Ed. 2d 310, 96 S.Ct. 2440 (1976). Detroit zoning ordinance restricting location of adult movie theaters held not to violate First Amendment rights. 5 to 4 decision.

THE BASKETTE COLLECTION: A RESEARCH REPORT

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Historical research in free speech is often hampered by the lack of accessibility to primary materials. In addition, the contents and location of collections of primary materials dealing with free speech are seldom publicized. Hence, the efforts of rhetorical scholars pursuing such avenues of investigation are restricted and their research limited. Since primary sources offer the choicest information to the scholar, the location and description of free speech collections would be most valuable. It is the purpose of this report to examine the largest free speech collection in the United States--the Baskette Collection.

Ewing Baskette, a native of Clarksville, Tennessee, studied law and library science at Vanderbilt and Columbia Universities. While practicing law in Nashville, Tennessee, Baskette served as a volunteer defense counsel in the Scottsboro, Alabama, case. During this period he diligently began to collect materials on civil liberties and freedom of expression. He served as librarian at the University of Kentucky, assistant law librarian at the University of North Carolina, and reference librarian at the University of Georgia. In later years he served as librarian at McKendree College, Lebanon, Illinois, and Mattoon High School, Illinois. He was assistant cataloguer at the Illinois State Library at the time of his death in 1959. The Rare Book Room of the University of Illinois acquired his collection in 1959 from his widow.

The collection covers a wide variety of subjects under the broad category of freedom of expression: anarchy, censorship, civil liberties, communism, constitutional rights, freedom of speech and freedom of the press, labor-union activities, religious freedom, and socialism. Dating from the sixteenth century to 1959, the collection contains books, pamphlets, letters, catalogues, photographs, autographs, manuscripts, posters and broadsides, court briefs and transcripts, and newspaper and magazine acticles. Following the requirement "rare enough to be quite valuable or interesting enough to be well out of the ordinary,"[1] Baskette built a collection of more than ten thousand items. Included are items that were banned or ordered burned, books for which their authors were persecuted, exiled, or even executed, and numerous materials that are no longer extant.

Physically the collection is divided into two sections: catalogued and uncatalogued. The latter contains three divisions: periodicals, court cases, and the vertical file. The catalogued section is arranged according to the Library of Congress system and is shelved separately. Its two thousand items are indexed by author and title in the Rare Book Room's regular card-catalogue file as well as being indexed in a separate subject file. While containing primarily books, it includes a few periodicals and pamphlets. The periodical division of the uncatalogued section consists of 151 separate titles. Most of them relate to anarchism and similar subjects. The division of court cases contains trial transcripts, briefs, appeals, arguments, and decisions relating to 467 various facets of civil liberty. The vertical file is the largest division of the collection. It contains pamphlets, articles, and leaflets on a variety of topics, each shelved in an individual packet. Separate alphabetical indexes are available for each of the three divisions of the uncatalogued sections.[2]

The writer's selection of interesting items from each section follows:

The Catalogued Section

Alton Trials. Numerous materials are available concerning this 1838 episode relating to the Alton Observor, an abolitionist newspaper, edited and published by Elijah Lovejoy. Lovejoy was killed while defending his printing press at Alton.

Bunyan, John. A copy of his 1672 pamphlet A Relation of the Imprisonment of Mr. John Bunyan, for which the author was imprisoned because of his religious beliefs.

DeFoe, Daniel. An original 1702 edition of DeFoe's The Shortest Way With Dissenters, a pamphlet for which the author was pilloried.

Galileo. A copy of his Dialogue on the Great World System, for which he was condemned and sentenced to perpetual house arrest.

Goodman, Christopher. A copy of the original 1558 publication: How Superior Powers Ought to be Obeyed. Queen Mary of England once sentenced a man to death for having a copy of this book in his possession.

Huss, John. De Ecclesia, for which he was burned at the stake.

Knowlton, Charles. Fruits of Philosophy, a nineteenth-century essay resulting in an early obscenity trial.

Luther, Martin. Early copies of his treatises, which were ordered burned in 1519 and 1521.

O'Hare, Kate. A collection of 124 mimeographed letters to her husband, Frank, and her children entitled, Dear Sweethearts.

Paine, Thomas. A 1776 edition of his Common Sense and a 1792 edition of his libel trial.

Rabelais. The burned and censored Gargantua.

Servetus, Michael. Two treatises on the Trinity were ordered burned. Servetus was later burned at the stake.

Sinclair, Upton. A copy of his Oil.

Tyndale. His translation of the New Testament, which was burned in London. Its author was burned for heresy in 1536.

Vanini, Junius Caesare. A 1615 work in Latin: an argument for and against the theology of his day. This publication resulted in a charge of atheism. He was burned at the stake, presumably with all his books. However, four known copies are in the United States, one of which is in this collection.

Williams, Roger. A rare facsimile copy of his Bloody Tenet, which was burned in England.

Wilkes, John. A document: The North Britan, no. 45, describing the proceedings against Wilkes which resulted in the origin of the Fourth Amendment to the Constitution prohibiting "general warrants."

Zenger, John Peter. A 1734 pamphlet: The New York Weekly Journal, which includes his trial.

This section contains the case of Abner Kneeland, who was charged with blasphemy in Boston in 1834, 122 items on labor and laboring classes, 45 entries on liberty of speech and of the press, 11 items on immoral literature, 16 items concerning Lovejoy and the Alton riots, 5 items on the sixteenth-century Marprelate controversy, 12 on utopias, 66 on anarchism and anarchists, and 21 on censorship.

Also included are materials on such topics as free thought, folklore, fascism, banned and condemned books, agnosticism, reformation, conscientious objectors, ethics, witchcraft, nudism, strikes and labor, revolutions, perjury cases, social problems, and the alien and sedition laws. Other entries involve Mikhail Bakunin, Whittaker Chambers, Joseph McCarthy, John Peter Altgeld, Emile Zola, Sacco and Vanzetti, and Scott Nearing.

Uncatalogued Periodicals

The Absolutist. Identified as a journal "Devoted to the interests of those with conscientious scruples against any form of war service." Published by Julius Eichel and the Absolutist War Objectors' Association of Brooklyn, New York. Scattered issues, 1943-46.

The American Civil Liberties Union Annual Report. 1925/26 through 1958/59.

The Anarchist: A Revolutionary Review. Edited by Henry Seymour. Scattered issues, 1885-87.

At the Sign of the Silver Horse. Containing reports and editorials concerning the banning of books and the use of literature as protest. 1954-56.

Delphic Review: An Anarchist Quarterly. 1949-50.

The Emancipator and Journal of Public Morals. New York. Extras, August 6, 1834, and January 13, 1835. These represent the oldest items in this division. An abolitionist publication.

The Free Commune: A Quarterly Magazine of Libertarian Thought. Published by the Leeds Free Communist Group.

Liberator. New York. Published by Max Eastman. 1918-24.

Man: A Journal of Anarchist Ideals and Movement. San Francisco. Scattered issues, 1934-39.

Mother Earth Bulletin. Published by Emma Goldman in association with the Political Prisoners' Defense League of America. 1917-18.

The New International: A Monthly Organ of Revolutionary Marxism. New York, 1938.

New York Society for the Suppression of Vice. Annual Reports. (Later known as the New York Society to Maintain Public Decency.) 1878-92, 1894-97, 1901-12.

The Proletarian: A Journal of International Socialism. Scattered issues, 1919-30.

The Radical Review: A Publication for the Thorough, Fearless, and Impartial. Scattered issues, 1877-78.

The Redcap. 1900. Published by the International Revolutionists.

The Torch: A Revolutionary Journal of Anarchist Thought. Scattered issues, 1895-96.

Uncatalogued Court Cases

A.C.L.U. 1953, A.C.L.U. v. the City of Chicago, a prior-restraint case.

Caldwell, Erskine. 1949, Massachusetts v. Caldwell et al. concerning his novels.

The Chicago Socialists. 1918, Victor Berger et al. v. the U.S.A.

Choolokian, Hamportzoon. 1948 Hamportzoon Choolokian v. The Mission of the Immaculate Virgin.

Communist organizations. 1949, Soviet Friendship, Inc. v. U.S. Attorney General; 1950, National Council of America v. U.S. Attorney; 1950, Joint Anti-Fascist Refugee Committee v. U.S. Attorney General. All three cases involve the listing of the plaintiff as a communist organization.

Communist Party of America. 1955, Communist Party of America v. Subversive Activities Control Board.

The Freethinkers of America. A case against Trinity Church of New York City concerning the selling of a copy of a letter "of political advice by George Washington, 8 June 1783." The letter was said to be a forgery.

James Joyce. 1934 case involving Random House and Joyce over his publication. Ulysses.

Oregon. 1925, the State of Oregon v. The Sisters of the Holy Name of Jesus and Mary, involving compulsory education.

Pegler, Westbrook. The 1950 libel case against Pegler.

Dred Scott. The oldest case in this division is the Dred Scott (A Colored Man) v. John Sandford. Includes the original transcript of the [illegible] trial.

Other cases involving civil-liberties amendments include Schenk (1919), Abrams (1919), Gitlow (1923) Cantwell (1940), Chaplinsky (1942), Terminello (1949); Kunz (1951), Beauharnais (1951/52), Roth (1956/57), and Barenblatt (1958/59). Materials included in these files are original transcripts, briefs, amicus curiae briefs, letters, and notes of attorneys and participants, appeals, arguments, and decisions.

Uncatalogued Vertical File

A.C.L.U. This packet contains 134 items published by and about the American Civil Liberties Union: includes such topics as censorship and religious freedom. Included are materials by the Americans for Moral Decency League, a chronological survey of the important dates concerning the confiscation of the Talmud, an 1897 copy of Byron's suppressed poem "Forbidden Fruit," the controversial picture "September Morn," and a 1939 Nazi list of banned books.

American Utopias. Materials on such communities as the Brook Farm, the Newark Christian Community, the Freeland Colony, the Amana Society, the Bishop Hill Colony, the Ruskin Co-operative Colony, and others. Also included is a list of American utopias through 1900 and a supplemental bibliography.

Anarchism and Anarchists. This, the largest packet, contains items dating from 1870 to 1959. Of special interest is a 42-item collection of anarchist broadsides.

Catholic Church--Controversial Materials. A large assortment of anti-Catholic views, including several pamphlets such as The Devil's Prayer Book, Crimes of Priests, and Behind Convent Bars.

Censorship. Contains 300 items representing numerous views and events.

Conscientious objectors. 72 items, including the handwritten notes of Baskette made as he visited conscientious objectors imprisoned in 1918 at Fort Riley, Kansas.

Free Speech. Numerous articles and pamphlets, including a 1919 bibliography published by the Free Speech League of New York.

Haywood, William. A rare copy of "Big Bill" Haywood's plea in the case of the bomb killing of Frank Stuenberg, former governor of Idaho.

Hill, Joe. This unique collection contains 11 pamphlets and 7 song sheets of I.W.W. songs such as "Casey Jones--the Union Scab," and "Dump the Bosses off Your Back."

The Houndsditch Tragedies. Complete account of these murders and the historic siege of foreign anarchists in London.

Hutchinson, Anne. An 1888 report of 1638 trial.

Ingersoll, Robert G. Rare photos, speeches, and tracts.

Mexican-American Civil Rights. 12 items.

Paine, Thomas. Three nineteenth-century pamphlets on Paine, one being an 1871 copy of an oration by Robert G. Ingersoll: "On the Life and Services of Thomas Paine."

Political Crimes and Offenses. 22 items: letters and tracts written by individuals while in prison and circulated by such groups as "The Children's Crusade to Free the Political Prisoners" (1919), "Political Prisoners' Defense and Relief Committee" (1922), "Anarchist Red Cross Society" (1924), and "Amnesty League" (1919).

Spanish Civil War. 278 items: numerous posters and broadsides and six cloth banners.

Unamerican Activity Investigations. Material on the McCarthy era, the McCarran [redacted] HUAC hearings, and the Voorhis Blacklist Bill.

Other topics in this division deal with anti-communist movements, civil rights, anti-Semitism, politi[redacted]toons, the Fabian Society, the Haymarket riots, fascism, sabotage, [redacted]reedom of speech, the press, and religion. Also included are items [redacted]osiah Warren and New Harmony, Theodore Albert Schroeder, a copy of Esquire banned from the mails, and 35 items on women's rights, dating from 1890 to 1956.

FOOTNOTES

[1] Sexington Herald, January 4, 1942.

[2] Queries concerning specific holdings in this collection should be addressed to N. Frederick Nash, Rare Book Room, University of Illinois, Urbana, Illinois, 61801.

RAWLS'S A THEORY OF JUSTICE AND FREEDOM OF EXPRESSION

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At the present time there is no coherent justification universally accepted as a philosophical underpinning for the right of freedom of expression as enunciated in the First Amendment. This lack is well expressed by Thomas I. Emerson, who writes:

> In recent years much uncertainty and controversy have marked the effort to formulate the legal doctrines pertaining to freedom of expression and to fix the role of legal institutions in maintaining them. . . . There has been little effort to reappraise legal doctrines and institutions in light of the new situation. And, even less consideration has been given to the extension of legal theory to new problems posed by modern conditions.[1]

The accuracy of Emerson's position is made evident by turning to recent Supreme Court cases in the area. The justifications given in the cases have not been consistent, nor have they been addressed to first principles; rather, the decisions have been rendered and justified on an ad hoc basis.

The problems posed by this approach are obvious: First, there is a lack of predictive ability. Some jurists have made such an ability the basis of their definition of the law.[2] Second, without such a philosophical justification the pressures of the moment assume increasing importance. The result can be a loss of the legitimizing principles provided by a Public Philosophy.[3] This loss is reflected by the number of recent attempts to provide such a philosophical underpinning for freedom of expression. Besides Emerson, such scholars as Meiklejohn, Bickel, Shapiro, and Abraham have addressed themselves to various aspects of the problem.[4] Several of their works are quite recent; no consensus has yet emerged.

Another attempt is the one made by Rawls in A Theory of Justice. It is partial because he provides only a framework for approaching the problem of establishing guarantees for liberty; he does not attempt to specify all the guarantees or the procedures necessary to ensure their effectiveness. In spite of this incompleteness, however, the current outpouring of articles on Rawls's book indicates that what he has to say about liberty is being taken very seriously by the academic community.[5]

This paper is divided into two sections. The first is an explication and critique of those sections of A Theory of Justice addressed to the question of liberty. The second section is an analysis of how Rawls's system, if in effect, would have altered or buttressed several major cases in the area of freedom of expression. Rawls, with his emphasis on correct procedures as opposed to correct results,[6] probably would find the second section to be irrelevant. But it seems to me that before an alteration of the fundamental principles of society can be seriously considered, it is not asking too much that such an alteration be justified on the basis of results. As Caws notes, "what makes an argument moral is never merely its form but always also the use to which it is to be put and the practical consequences of that use."[7] Those results can be ascertained only by looking to specific situations and asking

how they would have been changed, if at all, by such an approach. A brief conclusion follows the two sections of the paper.

Explication and Critique

The basic sections of A Theory of Justice applicable to this paper are chapter four: "Equal Liberty"; and section 67: "Self-Respect, Excellence, and Shame"; and section 82: "The Grounds for the Priority of Liberty." Chapter two: "The principles of Justice"and chapter three: "The Original Position" lay the groundwork for Rawls's theory.

The starting point of this analysis is the fact that Rawls classifies liberty as a "primary good." Primary goods are defined as "things which it is supposed a rational man wants whatever else he wants" (p. 92). Examples are "rights and liberties, opportunities and powers, income and wealth" (p. 92). They are means to the "good." The "good," briefly put, "is the satisfaction of rational desire" (p. 93). While people in the original position (people without privileges and under a limited veil of ignorance) "do not know their conception of the good, they do know, I assume, that they prefer more rather than less primary goods" (p. 93). Primary goods are used to pursue the good "as long as it does not violate what justice demands" (p. 93). Several comments need to be made at this point:

First, Rawls assumes that "whatever one's system of ends, primary goods are necessary means" (p. 93). This is an obvious overstatement. Rawls later backs off from it. For example, (p. 142) he writes that "it may turn out, once the veil of ignorance is removed, that some of them for religious or other reasons may not, in fact, want more of these goods." Even in the original position, however, the representative men have some knowledge of the religious structure of the society that they will be entering (see below), so they know even at that point that they may not necessarily want more rather than fewer primary goods. The other side of this argument is that, once the veil of ignorance is removed, people may find that their rational satisfaction of desire may require more of the primary goods than it is possible to allot them. Rawls notes that if you require less, you can always renounce the overage (p. 143). What do you do if you require more? When the people who require fewer primary goods relinquish them, are they divided evenly, or are they turned over to people whose life styles require more primary goods? Which system is fair? Another obvious question is: How do you relinquish a primary good such as liberty? Is the fund of liberty increased by such a relinquishment? If so, where does the overage go? How does one utilize more of such a good? In short, there is a question as to the ability of the representative men in the original position to achieve an effective distribution of the basic primary goods. The basic psychological factor that would insure this choice of more rather than fewer primary goods is envy. But Rawls rules envy out of the original position (p. 143). The reason he rules it out is that envy may compel an egalitarian position if the people in the original position could enforce their will (p. 538). Egalitarianism, in turn, may run into incentive and production problems (section 42: "Some Remarks About Economic Systems"). Therefore, envy has to be ruled out.[7] This decision, as well as leading to the problem discussed above, has been questioned as an arbitrary decision.[8]

Finally, there is a problem in classifying liberty as a good or as a means. The analogy with a good implies several extensions: First, liberty seems to become a static possession rather than a right that is affected only

in a state of process. Second, it implies that a quantitative value can be placed on liberty. In fact, Rawls places an economic value on freedom even while seeming to deny that he is doing so. And, finally, the classification of liberty as a means rather than as an end implies that liberty has no intrinsic worth. Just what does have the intrinsic worth that liberty is a means to, is never made explicit. At times it seems to be any rationally chosen way of life (p. 142); at other times it seems to be a way of life only in keeping with the principles of justice (p. 454). In any event, it is not self-evident that a rationally chosen way of life has to be in accord with Rawls's particular conception of justice. In short, he consigns liberty to a subsidiary position in his overall framework. It is a means. This makes it easier to barter away liberty than if it were conceived of as an end. When this can be done, the possibility of leading diverse life styles is endangered. This, of course, Rawls does not want. That is evident in his stress on different rational ends (e.g. sections 33 and 34). But while Rawls does not want such a result, Allan Bloom writes that it is the logical extension of his position.[9] If, indeed, the ends of man are many, liberty itself must become an end. As Isaiah Berlin writes:

> If, as I believe, the ends of man are many, and not all of them are in principle compatible with each other, then the possibility of conflict--and of tragedy--can never wholly be eliminated from human life, either personal or social. The necessity of choosing between absolute claims is then an inescapable characteristic of the human condition. This gives its value to freedom as Acton had conceived of it--as an end in itself, and not as a temporary need. . . .[10]

At this point, Rawls's theoretical position on liberty should be enunciated. The position is to be found in the "First Principle of Justice," the "First Priority Rule," and the "General Conception." The final statement of these is found on pages 302-303:

> First Principle--Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.
>
> First Priority Rule— The principles of justice are to be ranked in lexical order and therefore liberty can be restricted only for the sake of liberty. There are two cases:
> (a) a less extensive liberty must strengthen the total system of liberty shared by all;
> (b) a less than equal liberty must be acceptable to those with the lesser liberty.
>
> General Conception— All primary social goods—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored.

At this point, I want to address only the "General Conception" and the "First Principle." In the next subsection, I will discuss the "First Priority Rule."

First, it should be noted that the "General Conception," upon which the "First Principle" is based, refers only to the equalization of liberty, not to its maximization.[11] Even in the "First Principle" the maximization of and the extent of liberty are bounded by this equalization principle. As will be noted below, this leads to a semi-balancing position vis-à-vis the place of liberty in society.

Second, Rawls's statement of the "First principle" has changed over the course of time.[12] It has gone from "most extensive liberty" to "equal basic liberties." This is an obvious narrowing of the concept of liberty.

Just how much this concept has been narrowed becomes clear when examining his list of basic liberties:

> The basic liberties of citizens are, roughly speaking, political liberty (the right to vote and to be eligible for public office) together with freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person along with the right to hold (personal) property; and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law (p. 61).

Several problems arise here: First, does this mean that liberties that are not included in this list can be limited without concern for equality? The answer is not clear. Second, does it mean that liberties that are left off the list are not to be considered prior to Rawls's second principle of justice, which concerns economic distribution? Apparently so. Third, one must question the arbitrariness of this list. Rawls does not explicitly justify inclusion of this list as opposed to another; he merely says: "By way of general comment, these principles primarily apply, as I have said, to the basic structure of society. They are to govern the assignment of rights and duties and to regulate the distribution of social and economic advantages" (p. 61). Just how arbitrary this judgment is may be discovered by comparing Rawls's list with the liberties protected by the Bill of Rights--liberties that are also applicable to the basic structure of society. In particular the Ninth Amendment goes well beyond anything in Rawls.

Third, and most important, is the question of whether the representative men in the original position would accept such a "First Principle." I suggest that they would not, at least not on the ground that Rawls suggests. To make my case I would like to use the example that Rawls uses: equal liberty of conscience. His analysis of this issue is to be found in Section 33. One facet of liberty of conscience is freedom of religion. Some religions posit a heaven and hell. Some also hold that acceptance or rejection of the particular religion determines the outcome of going to one place rather than the other. Therefore, religious beliefs tend to be very important to some people. Rawls notes this fact on p. 207. The representative men in the original position do not know whether their religious preference is held by the majority or by the minority in the society of which they will become a part (p. 206). The question before them is to decide how to handle liberty of conscience. Rawls argues that they would accept the "First Principle" because:

> Now it seems that equal liberty of conscience is the only principle that the persons in the original position can acknowledge. They cannot take chances with their liberty by permitting the dominant religious or moral doctrine to persecute or to suppress others if it wishes. Even granting (what may be questioned) that it is more probable than not that one will turn out to belong to the majority (if a majority exists), to gamble in this way would show that one did not take one's religious or moral convictions seriously, or highly value the liberty to examine one's beliefs (p. 207).

Does it follow, because religious beliefs are strongly held, that therefore the people in the original position would accept equal liberty for all? I believe that the reverse holds. If an individual believes that he has the answer to the salvation of man, if he believes that men will be condemned to eternal hell if they do not accept his truth, would he not opt for limiting freedom and take a chance on being in the majority? I think that he would for the following reasons:

First, Rawls writes that the people in the original position "are not to view themselves as single isolated individuals." Rather "they have ties with

certain members of the next generation who will also make similar claims" (p. 206). If so, then is not the person with the strong religious beliefs taking a chance that his descendents will be corrupted by false doctrine? Is he not taking a chance that he and the present society will be damned? It seems to me that such an individual will take a chance on being in the majority. If he is not, there is always emigration.

Second, if religious views are strongly held and are sharply different, there will be a great amount of strain on a society that holds the "First Principle." Rawls recognizes this problem in section 79: "The Idea of Social Union" when he writes:

> The essential thing is that there be a shared final end and accepted ways of advancing it which allows for the public recognition of the attainments of everyone. When this end is achieved, all find satisfaction in the very same thing; and this fact together with the complementarity of the good of individuals affirms the tie of community (p. 526).

If religion is of fundamental importance, and if religious views differ sharply, will there be a shared final end? Probably not. The only possible shared final end in such a case is an agreement to disagree. Rawls does not demonstrate that such an agreement is sufficient to hold society together. In short, such a first principle would place a severe strain on social union. Would the representative man, recognizing this fact and taking his religion seriously, opt for the "First Principle"? Or would he not rather take a chance on being in the majority and prefer to limit religious conscience in ways he deems necessary?

My third argument on this point is an historical one. It appears that religious toleration did not become accepted, even on a limited basis, until the efficacy of religion itself was called into question. The religious open society as we know it (and as Rawls seems to postulate it) gained acceptance in the nineteenth century.[13] By this time the hold of absolutist religious truths appears to have been weakened. Thus, such a "First Principle" seems historically feasible only if a people does not hold strongly onto religious principles. But if this is true, the "First Principle" does not follow from the original position. If religious beliefs are not strongly held by the representative men, tolerance might be extended, but (1) it probably is not necessary to do so given the weakness of the beliefs, and (2) since the representative men do not hold such beliefs strongly, there is no sense in their taking a chance on extending such liberty of conscience to someone who might hold strongly onto such beliefs. Such an action would only take a chance on disrupting society. Thus, it does not appear that the "First Principle" can be justified by the analysis Rawls makes.

I would now like to address the "First Priority Rule." The crux of this rule is that "liberty can be restrained only for the sake of liberty." I have four suggestions to make with regard to this rule:

First, as Hart notes, Rawls cannot be entirely serious on this point. For example, such a rule would eliminate libel and slander laws. Libel and slander laws are limits on liberty but are not for the sake of liberty; they are "for protection from harm or loss of amenities or other elements of real utility."[14] If Rawls were entirely serious on this point, not only would such laws go by the wayside, but also such laws as those on false advertising would be eliminated.

Second, Rawls backs off from this principle himself when he writes that:

> Earlier I noted the intuitive idea behind the precedence of liberty (#26). The supposition is that if the persons in the original position assume that their basic liberties can be effectively exercised, they will not exchange a lesser liberty for an improvement in their economic well-being, at least not once a certain level of wealth has been attained. . . . The denial of equal liberty can be accepted only if it is necessary to enhance the quality of civilization so that in due course the equal freedoms can be enjoyed by all (p. 542).

Therefore, there is an initial limit of a basic economic condition and apparently there can be a later limit on liberty if the economic condition sags below a certain level. Several problems arise here: First, who decides the basic economic level? It cannot be the people in the original position, because they do not have the knowledge necessary to make such a decision. If it is not the people in this position, the people making the decision have some knowledge of their position in society, and one is confronted with the problem of privilege. This was the problem the hypothetical original position was designed to avoid. Second, this is more obvious when the question is: When has society dropped below the minimal level? Then the people making the decision obviously know their position in society. Third, and most important, it seems as if liberty to express oneself is of greatest importance when society is in a crisis. Serious thinking and action with regard to the crisis cannot take place if the debate can be cut off because of the economic level produced by the crisis.

Third, it should be preliminarily noted at this point that there is a problem connected with limiting liberty even for the sake of liberty. Rawls writes that "liberty of conscience is to be limited only when there is a reasonable expectation that not doing so will damage the public order the government should maintain" (p. 213). This type of analysis can (and has, as will be noted below) lead to suppression of political opponents, the arresting of political protesters, and the establishment of relocation camps (as in the case of Japanese-Americans in World War II).

Fourth, Rawls recognizes a problem with the "First Principle" and with the "First Priority Rule" in regard to the worth of liberty. For example, everyone may have equal liberty of expression, but is it really equal if one party does not have the funds necessary to pay for the expression but the other party does? Rawls argues as follows:

> Thus liberty and the worth of liberty are distinguished as follows: Liberty is represented by the complete system of the liberties of equal citizenship, while the worth of liberty to persons and groups is proportional to their capacity to advance their ends within the framework the system defines. Freedom as equal liberty is the same for all; the question of compensating for a lesser than equal liberty does not arise. But the worth of liberty is not the same for everyone. Some have greater authority and wealth, and therefore, greater means to achieve their aims. The lesser worth of liberty is, however, compensated for, since the capacity of the less fortunate members of society to achieve their aims would be even less were they not to accept the existing inequalities whenever the difference principle is satisfied (p. 204).

This argument is ambiguous, but it seems to go: (1) Equality of opportunity to exercise liberty does not mean an equal ability to gain from that opportunity. (2) Liberty cannot be made unequal to compensate for this inequality because that would violate the First Principle. (3) But it is of no real concern

because liberty is a means to an end. (4) The "Difference Principle"—that social and economic inequalities are to be tolerated if they raise the basic position of the least advantaged—equalizes the worth of liberty, because any additional advantage the privileged gain from the unequal worth is compensated for by a gain by the least advantaged in society. I believe that this analysis is unsatisfactory for several reasons: First, the argument seems to postulate that the worth of liberty can be quantified. If so, why is there a priority rule? If it can be quantified, then all that is necessary is an open market that sets the price. Second, Rawls argues that "perhaps the most important primary good is that of self-respect" (p. 440). It is debatable that this is a correct position. Maslow argues, for example, that the need of self-respect arises at the fourth level of his hierarchy and that other primary needs have to be substantially satisfied before this need assumes primary importance.[15] If Rawls is correct, however, it seems to me that self-respect is basically a function of other people.[16] If so, liberty and the worth of liberty are of primary importance since it is through expression and effectuating our plans of action that other people can evaluate us and our self-respect can be developed. In the just society, then, should one be expected to trade off worth of liberty for the advantages he gains under the "Second (economic) Principle"?[17] This is not necessarily to argue that liberty should be unequal, it is only to argue that Rawls does not give a convincing argument for its not being unequal.

At this point I would like to move from a summary and critique of Rawls's theoretical position and into the question of how specific instances would be handled differently, if at all, by a Rawlsian analysis. The next section consists essentially of extensions of the positions taken above. It should be noted that what Rawls would say about the specific cases discussed below is not clear as the analysis in A Theory of Justice is made basically at the original position stage.

Application of the Rawlsian Analysis

In applying Rawls's analysis I have decided to examine three areas of cases—two national-security cases that illustrate the clear and present danger rule: the Japanese-American relocation case and a speech-plus case. As the cases are used only for illustration, the explication of them is brief and does not purport to represent the final word of the Supreme Court in the area.

In this subsection I would like to discuss two national security cases: Schenck v. United States, 249 U.W. 47 (1919). and Dennis v. United States, 341 U.S. 494 (1951). Briefly, Schenck involved an indictment based on the Espionage Act of 1917. The defendants were accused of distributing documents designed "to obstruct the recruiting and enlistment service of the United States" and of causing "insubordination, etc., in the military and naval forces of the United States" (p. 49). Whether the documents distributed were actually capable of—and in fact did—produce the alleged harm is beside the point; what is to the point is that Justice Holmes wrote the opinion for a unanimous Court that upheld the convictions. During the course of his opinion Holmes enunciated the clear-and-present-danger test. It reads:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. . . . If the act (speaking, or circulating a paper), its tendency and the intent with which it is done, are the same, we perceive no ground for saying that success alone warrants making the act a crime (p. 52).

This test was modified to some extent, with Holmes's consent, by Justice Brandeis, concurring in Whitney v. California, 274 U.W. 357 (1927). Brandeis wrote that not only did the danger have to be clear and present but that it also had to be serious (p. 376).

The Dennis case involved the constitutionality of various provisions of the Smith Act. This act, directly or indirectly, made it a crime to knowingly and willfully (1) "organize as the Communist Party," and (2) to "advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence" (p. 494). Justice Vinson, with three justices joining him, wrote the opinion for the Court. He detailed the history of the clear-and-present-danger test. Then he posited that societal survival was the ultimate goal: "Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected" (p. 509). Vinson seemed to disagree with Brandeis that the danger had to be serious: "Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent" (p. 509). Vinson then offered his modification of the clear-and-present-danger test:

> Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: "In each case, (courts) must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such an invasion of free speech as is necessary to avoid the danger." 183 F. 2d at 212. We adopt this statement of the rule (p. 510).

The implication of this modification is obvious: Any expression that advocates the overthrow of the government can be suppressed. Survival of the government is deemed the ultimate value; destruction of the government is the gravest possible evil. Therefore, unless the improbability of the overthrow is 100 percent, the formula suggested by Vinson will result in a positive figure, and the expression advocating the overthrow can be suppressed. As Shapiro notes, this is simply "the remote bad tendency test dressed up in modern style."[18]

The question now is: Would Rawls's system allow or disallow such decisions? His answer seems to come in section 34: "Toleration and the Common Interest" and in section 35: "Toleration of the Intolerant." The "First Priority Rule": "and therefore liberty can be restricted only for the sake of liberty" suggests that Rawls approaches liberty as an absolutist. Yet closer analysis indicates that he comes out in much the same place as Holmes and Brandeis.

Rawls begins with a conception of limited government and views it as the agent of its citizens (p. 212). But then he writes:

> Granting all this, it now seems evident that, in limiting liberty by reference to the common interest in public order and security, the government acts on a principle that would be chosen in the original position. For in this position each recognizes that the disruption of these conditions is a danger for the liberty of all. This follows once the maintenance of public order is understood as a necessary condition for everyone's achieving his ends whatever they are. . . . (pp. 212-213).

Thus it is clear that Rawls, as do the above-mentioned justices, views government survival as of prime importance. This justification of government survival even at the expense of individual liberty is not adequately developed. What Rawls means by limiting liberty only for the sake of liberty is predicated upon the belief that a strong government with the power to suppress free speech is necessary if anyone is to enjoy liberty. In fact, he uses language reminiscent of Brandeis in Whitney:

> Furthermore, in holding that the consequences for the security of public order should not be merely possible or in certain cases even probable, but reasonably certain or imminent, there is again no implication of a particular philosophical theory (p. 213).

It seems as if Rawls accepts the Holmes/Brandeis limitation on free speech but rejects the Vinson analysis. The threat has to be imminent, not just possible.

But what is the practical implication of this position? The test appears on its face to be a limit on governmental power: The government can regulate liberty only when there is a clear, present, and serious danger. Yet Walter F. Berns notes that, given the history of the test, "The clear and present danger test actually becomes a rationale for avoiding the impossible prohibitions of the First Amendment and for convicting persons for speech that the government has forbidden."[19] Thus the position that Rawls arrives at, as is the case with Holmes and Brandeis, is not one of limitation on governmental power but one of permission to circumvent the First Amendment prohibitions.

Another practical problem that arises is: Who is to decide when the danger is sufficiently imminent and serious that free expression can be limited? Rawls argues that this "expectation must be based on evidence and ways of reasoning acceptable to all. . . . It represents an agreement to limit liberty only by reference to a common knowledge and understanding of the world. Adopting this standard does not infringe upon anyone's equal freedom" (p. 213). Several questions and objections arise here: Who makes this decision as to "ways of reasoning" and "evidence acceptable to all"? Do the representative men in the original position have the necessary knowledge? But if they are out of the original position, what about the problems with privilege? The fact that the cases went to the Supreme Court is a good indication that the parties involved did not agree on the evidence and the reasoning. If Rawls's readers disagree about his mode of theoretical reasoning (and the articles on Rawls indicate that they do), how can he possibly expect people in the real world, facing problems of freedom and survival, to agree on "evidence and ways of reasoning acceptable to all" or even on the procedures for collecting and analyzing the evidence?

One final comment needs to be made before turning to the next area: What would be the analysis with regard to an intolerant group that used peaceful means, as opposed to violent means, to impose its intolerant views? The question is not as strange as it seems. The Supreme Court faced essentially this same question in Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974). The case involved the efforts of the Communist Party to be placed on the Indiana ballot. Indiana refused because the party would not submit a required loyalty oath regarding the advocacy of overthrow of the government. For various reasons the Supreme Court ordered that the Communist Party be allowed a place on the ballot. It may be assumed that if the Communist Party gained power through the election process, its leaders would make an effort to curb traditional freedoms.[20] Would a Rawlsian analysis reach the same result as the Supreme Court? Apparently not. Rawls argues as follows:

> Suppose that, in some way or another, an intolerant sect come to exist within a well-ordered society accepting the two principles of justice. How are the citizens of this society to act in regard to it? Now certainly they should not suppress it simply because the members of the intolerant sect could not complain were they to do so. Rather, since a constitution exists, all citizens have a natural duty to uphold it. We are not released from this duty whenever others are disposed to act unjustly. A more stringent condition is required: There must be some considerable risks to our own legitimate interests (p. 220).

> It is only the liberty of the intolerant which is to be limited, and this is done for the sake of equal liberty under a just constitution the principles of which the intolerant themselves would acknowledge in the original position (p. 220).

Thus it appears that if there were a considerable chance that the Communist Party would be elected, Rawls would keep them off the ballot. While no such considerable chance existed in Indiana, the opinion of the Court did not mention such a condition. An objection to Rawls's position naturally arises at this point: How free are a people if they are not free to peacefully change to an authoritarian form of government? Would the representative men in the original position really rule out any future possibility of changing to an intolerant form of government? Would they really place such limitations on the future generations for which they are responsible? Even Rawls suggests that they would not when he argues that freedom (toleration of opposing views) is only a means. If so, then an authoritarian form of government may be best suited to attaining the ends of a particular society.

The danger of abandoning an absolute prohibition in favor of a balancing test, even one that is as strictly drawn as the Holmes/Brandeis version of the clear-and-present-danger test, is evidenced by Korematsu v. United States, 323 U.S. 214 (1944), the Japanese-American relocation case. While it does not pertain directly to the subject of freedom of expression, I believe that it is reasonable to discuss it here. First, Berns discusses it in his analysis of the clear-and-present-danger test.[21] Second, it directly concerns the subject of limiting liberty. Third, it is a good vehicle for expanding the analysis of Rawls's position vis-à-vis the First Amendment and freedom of expression.

In brief, Korematsu involved the relocation of people of Japanese origin from the west-coast areas to inland areas during World War II. This relocation was based on a military order authorized by Executive Order No. 9066. When the relocation was challenged in the Supreme Court, it was upheld. In the majority opinion by Justice Black we find this statement:

> We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it (p. 218).

In short, given the critical nature of the moment, the military was justified in taking the steps it did. Black held that it was not up to the Supreme Court, in hindsight, to change that decision (p. 224).

Yet, in hindsight, the decision to relocate people of Japanese origin appears to have been wrong. For example, Edward S. Corwin wrote: "Hindsight makes it clear that there was no necessity for the Japanese measures. Certainly, chronology supports such skepticism."[22] What caused such a mistake to be made? Justice Murphy, in a stirring dissent in Korematsu, laid the blame on "racial and economic prejudices" (p. 239). Corwin laid it on "increased pressure from interested and/or hysterical groups of west-coast citizens."[23] Both blamed public pressure. Would Rawls permit the same mistake to be made?

There is some indication that Rawls distrusts and, therefore, would discount public pressure. For example, in section 68: "The Right and the Good Contrasted" he writes:

> In justice as fairness, however, this problem never arises: The intense convictions of the majority, if they are indeed mere preferences without any foundation in the principles of justice antecedently established, have no weight to begin with. The satisfaction of these feelings has no value that can be put in the scales against the claim of equal liberty . . . Against these principles neither the intensity of feeling nor its being shared by the majority counts for anything. On the contract view, then, the grounds of liberty are completely separate from existing preferences (p. 450).

Thus it appears that Rawls does not trust the pressures of the majority and would not reach the result in Korematsu, at least not because of such pressures. (The discounting of intensities raises other problems, of course, but they are beyond the scope of this paper.)

Without such popular pressure being taken into account, would Rawls still reach the decision of the Court in Korematsu? In the foregoing statement, he suggests that to limit liberty one has to go back to the principles established in the original position. The principles of the original position are reached on a risk-aversion strategy. There is some question whether the representative men in the original position would really operate on this basis.[24] Assuming that they would, would Korematsu still result? When writing on freedom of conscience (see above), Rawls argues that men in the original position, if they felt strongly about religion and were unsure whether they would be in the majority or minority, would opt for the "First Principle," guaranteeing liberty. It seems that here, where actual physical liberty is at stake, the men in the original position would not allow the possibility that they would be in the group subject to relocation.

But then the question arises as to how these men in the original position can get from the principles arrived at to a clear-and-present-danger analysis as set out in my first subsection. Yet Rawls argues that they would get there in spite of or because of the principles he sets out. In short, it is not clear whether he would arrive at the Korematsu decision. He discounts public pressure in favor of the impartiality of the original position; but then he also allows the principles arrived at to give rise to repression if there is a serious and imminent danger and if evidence and ways of reasoning can be accepted by all. The door seems to be open for the mistake to be made again.

I would now like to turn briefly to speech-plus cases. These are cases that involve action as well as expression in the communication attempt. Apparently the judicial analysis of such cases began in the labor-picketing case of Thornhill v. Alabama, 310 U.S. 88 (1940). At the present time such analysis is found in guerrilla-theater cases (e.g. Schacht v. United States, 398 U.S. 58 (1970)), demonstration cases (e.g. Tinker v. Des Moines, 393 U.S. 503 (1969)), etc. The case I would like to discuss here is United States v. O'Brien, 391 U.S. 367 (1968). This case involved a young man who protested the Viet Nam War by burning his Selective Service registration certificate. This violated the Universal Military Training and Service Act. O'Brien's defense was the First Amendment guarantee of free speech. The appellate court's reversal of his conviction was vacated by the Supreme Court, and his sentence reinstated. In the opinion for the majority of the Court, Chief Justice Warren wrote:

> We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. The Court has held that when "speech" and "nonspeech"

> elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms (p. 376).

The question is: Would Rawls reach the same result?

My argument here has to be very brief, because I believe that Rawls has failed to provide an analysis sufficient enough to arrive at an answer. As noted, the "First Principle" allows for regulation of liberty only for the sake of liberty. As also noted, one of the basic liberties is "freedom of speech and assembly." These basic liberties can be regulated when there is imminent and serious danger to society. So the question appears to be, in a particular case, whether there is such a danger. But do we really have to reach this question? Note what Rawls has classified as a basic liberty: "freedom of speech and assembly." Does the burning of a registration certificate even fall under this heading? Rawls does not give us an answer. I suspect that he would reach the same decision as the Supreme Court: The representative men in the original position would believe that society has to be defended, that a registration certification aids the accomplishment of that end, and that freedom of expression (if the burning of a registration certificate is expression) can be regulated for this primary end. What I am adding here is that Rawls's analysis is incomplete in that he fails to draw a distinction between types of speech. The basic liberty he discusses is more complex than his argument recognizes. At times speech alone is not sufficient for making a communication attempt effective. When it is not, and action is added to the speech, does the "First Principle" cease to protect it? This question is one that Emerson attempts to answer. His answer is based on a distinction between communication efforts that are primarily speech and those that are primarily action. One is protected by the First Amendment; the other is not.[25] Rawls seems to have glossed over this distinction. Another distinction that should be noted here (and one that he also fails to discuss) is the distinction between expression directed to a public good and one directed to a private good. As Meiklejohn notes, this distinction should make a difference when regulation is being considered.[26] In short, the liberty of freedom of expression is not a simple, undifferentiated liberty, as Rawls's analysis seems to suggest.

Conclusion

In summary I do not believe that a Rawlsian analysis can be adequately developed to support the type of absolutist position on freedom of expression that, in the view of Justice Hugo Black and others, is set out in the First Amendment. I believe that this is true for the following reasons:

1. Rawls seems to ignore historical mistakes that should guide his philosophy. In fact, he argues (p. 86) that substantive mistakes can be justifiably made by correct procedures: that it is the procedure that is important, not the results. But if a procedure that will result in such mistakes as Korematsu is adopted, perhaps that procedure is not adequate.

2. Rawls seems to assume that government survival is of supreme value. This assumption needs a more adequate justification. If the survival of the government is based on suppression of basic liberties, should the government continue to survive?

3. I am not satisfied that the representative men in the original position would adopt the "First Principle." This is not to say that the "First Principle" should be adopted, only that Rawls's argument for it seems unconvincing. I would suggest that Mill's analysis, which Rawls attempts to refute (pp. 209-211), is more likely to result in the adoption of the First Amendment or even the "First Principle."

4. Rawls's concept of the basic liberty of freedom of speech suffers from two basic oversimplifications: A. He fails to distinguish between purposes of expression and provides no method for ranking the purposes. B. He fails to distinguish between types of expression which have significantly different consequences for society.

5. The last and most basic objection I have to Rawls's framework is that he classifies freedom of expression as a means and not as an end. When this is done, the door is open for balancing away that freedom if other means to the ends seem more adequate. If free expression is balanced out of existence, the possibility of an effective and nonviolent evolution of society is, at best, limited.

This is not to deny the importance of A Theory of Justice. Even the writers of articles critical of the book concede its importance. Rawls has stimulated discussion of the most important problems facing our society. While the work may be deficient in some respects, it is still one of the most important philosophical works of our time.

FOOTNOTES

Dr. Milton Garber made valuable comments on an earlier draft of this paper.

1. Thomas I. Emerson, The System of Freedom of Expression (New York: Vintage Books, Randon House, 1970), p. 5.

2. See, for example, Oliver Wendell Holmes, "The Path of the Law," in Collected Legal Papers, ed. Harold J. Laski (New York: Harcourt, Brace and Co., 1920), p. 173.

3. Walter Lippmann, The Public Philosophy (New York: Mentor Books, New American Library, 1955), pp. 96-101.

4. Alexander Meiklejohn, Political Freedom (New York: Galaxy Books, Oxford University Press, 1960); Alexander M. Bickel, The Morality of Consent (New Haven: Yale University Press, 1975): Martin Shapiro, Freedom of Speech: The Supreme Court and Judicial Review (Englewood Cliffs: Prentice-Hall, 1966); and, Henry J. Abraham Freedom and the Court, 2d ed. (New York: Oxford University Press, 1977

5. See, for example, the collection Reading Rawls, ed. Norman Daniels (New York: Basic Books, n.d.).

6. John Rawls, A Theory of Justice (Cambridge: Belknap Press, Harvard University Press, 1971), p. 85 ff. All future references to A Theory of Justice are made in the text.

7. Peter Caws, Science and the Theory of Value (New York: Random House, 1967), p. 4.

8. Thomas C. Grey, "The First Virtue," Stanford Law Review 25 (January, 1973): 321.

9. Allan Bloom, "Justice: John Rawls Versus the Tradition of Political Philosophy," American Political Science Review 69 (June 1975): 662.

10. Issiah Berlin, Four Essays on Liberty (New York: Oxford University Press, 1969), p. 169.

11. This fact is also noted in H. L. A. Hart, "Rawls on Liberty and Its Priority," University of Chicago Law Review 40 (Spring 1973): 535.

12. Hart, p. 539.

13. Richard E. Morgan, The Supreme Court and Religion (New York: Free Press, Macmillan Publishing Co., 1972), p. 10.

14. Hart, p. 534.

15. Abraham H. Maslow, Motivation and Personality, 2d ed. (New York: Harper and Row, 1970), p. 45 and p. 37.

16. For example, George H. Mead writes in Mind, Self, and Society, ed. Charles W. Morris (Chicago: Phoenix Books, University of Chicago Press, 1962), p. 223: "Our contention is that mind can never find expression, and could never have come into existence at all, except in terms of a social environment; that an organized set or pattern of social relations and interactions . . . is necessarily presupposed by it and involved in its nature."

17. It may be argued that affirmative action programs present a philosophical position that is counter to Rawls's position. Liberty (equality of opportunity) is made unequal by such programs in order to compensate for a differential in the worth of liberty (mobility in society).

18. Shapiro, p. 65.

19. Walter F. Berns, Freedom, Virtue and the First Amendment (Chicago: Henry Regnery, 1965), p. 56. In support of this position Berns writes: "It is the opinion of the present writer that the Supreme Court, at least, has overturned only one conviction on the basis of the clear-and-present-danger doctrine — when that doctrine has been applied to a situation for which it was designed" (p. 52).

20. See the comments from the state's brief cited by the Court on p. 450 of their opinion.

21. Berns, p. 52.

22. Edwards S. Corwin, The Constitution and What It Means Today, 1973 ed. revised by Harold W. Chase and Craig R. Ducat (Princeton: Princeton University Press, 1973), p. 80.

23. Corwin, p. 80.

24. See, for example, the analysis by David Lyons in "Rawls Versus Utilitarianism," Journal of Philosophy 69 (October 5, 1972): 535-545.

25. Emerson, p. 18.

26. Meiklejohn, pp. 36-37.